



Billing Code: 4910-60-P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 105, 107, and 171

[Docket No. PHMSA-2012-0260 (HM-233E)]

RIN 2137-AE99

Hazardous Materials: Special Permit and Approvals Standard Operating Procedures and Evaluation Process

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Final rule.

SUMMARY: PHMSA is adopting regulations to include the standard operating procedures (SOPs) and criteria used to evaluate applications for special permits and approvals. This rulemaking addresses issues identified in the Hazardous Materials Transportation Safety Improvement Act of 2012 related to the Office of Hazardous Materials Safety's Approvals and Permits Division. In addition, this rulemaking also provides clarity regarding what conditions need to be satisfied to promote special permit application completeness. An application that contains the required information reduces processing delays by reducing the number of applications rejected due to incompleteness. Through public notice and comment, this final rule is required to establish SOPs to support the administration of the special permit and approval programs, and objective criteria to support the evaluation of special permit and approval applications. These amendments do not change previously established policies, to include but

not limited to any inspection activities subsequent to issuance, modification or renewal of a special permit and approval.

DATES: The final rule is effective on **[INSERT 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

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I. Executive Summary

On July 6, 2012, the President signed the Moving Ahead for Progress in the 21st Century Act (MAP-21), which includes the Hazardous Materials Transportation Safety Improvement Act of 2012 (HMTSIA) as Title III of the statute. See Public Law 112–141, 126 Stat. 405, July 6, 2012. Under section 33012 of HMTSIA, Congress directed the U.S. Department of Transportation (Department or DOT) to issue a rulemaking to provide:

- Standard operating procedures (SOPs) to support the administration of the special permit and approval programs; and
- Objective criteria to support the evaluation of special permit and approval applications.

In this rulemaking, PHMSA is amending the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) to incorporate procedures to support the administration of its special permits and approvals programs in a new Appendix A to Part 107, Subpart B of the 49 CFR. Incorporation of SOPs and objective criteria to support the evaluation of special permits and approvals accomplishes the mandate under section 33012 of MAP–21. By incorporating these internal agency procedures into regulation, PHMSA believes the benefits of this final rule will increase the public’s understanding of the special permit and approval application and renewal process, improve the quality of information and completeness of applications submitted, improve application processing times, improve the quality of information and completeness of applications submitted, improve application processing times, promote continued safe transportation of hazardous materials, and support U.S. trade competitiveness by permitting safe and innovative transportation methods for hazardous materials. Because this final rule will affect only agency procedures, PHMSA assumes no change in current industry costs or benefits and that this final rule does not impose additional costs on industry.

II. Background

The HMR prescribe regulations for the transportation of hazardous materials in commerce. PHMSA issues one type of variance from the HMR in the form of a “special permit.” It also provides written consent to perform a function that requires prior consent under the HMR in the form of an “approval.” These variances are designed to accommodate innovation, provide consent, and allow alternatives that meet existing transportation safety standards and/or ensure hazardous materials transportation safety. Federal hazardous materials (hazmat) law directs the Department to determine if the actions specified in each application for

a special permit establish a level of safety that meets or exceeds that already present in the HMR, or if not present in the HMR, establish a level of safety that is consistent with the public's interest. PHMSA, through the HMR, applies these same conditions to the issuance of an approval. Due to the unique features that may exist in each application, PHMSA issues special permits and approvals on a case-by-case basis.

The HMR currently define a special permit as “a document issued by the Associate Administrator, or other designated Department official, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapter A or C of this chapter,” “or other regulations issued under 49 U.S.C. 5101 et seq. (e.g., Federal Motor Carrier Safety routing requirements).” (See 49 CFR 105.5, 107.1, and 171.8.) An approval is currently defined in the HMR as “written authorization...from the Associate Administrator or other designated Department official, to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter....” Applicants who apply for a special permit must do so in conformance with the requirements prescribed in §§ 107.101 to 107.127 of the HMR. Applicants who apply for an approval must do so in conformance with the requirements prescribed in §§ 107.401 to 107.404, and §§ 107.701 to 107.717 of the HMR.

PHMSA amended the HMR in 1996 (61 FR 21084) to include as part of the approval application review process a requirement to review each applicant's fitness to perform the tasks requested in their applications. PHMSA also issued and updated internal SOPs several times over the past decade to support the process and issuance of special permits and approvals that comply with the HMR. On February 29, 2012 (see Docket No. PHMSA-2011-0283), PHMSA held a public meeting to invite public comment on these considerations. In July 2012, PHMSA

established a working group to examine ways to streamline the fitness review process while maintaining an acceptable level of safety, to expand the fitness review process to include special permit applicants, and to define and determine the adequacy of criteria that should be used to initiate fitness reviews. As a result of this working group's efforts, PHMSA published a Notice of Proposed Rulemaking (NPRM) on August 12, 2014 (79 FR 47047) to invite public comment on its proposal to add updated SOP and evaluation criteria to process special permit and approval applications. Specifically, the NPRM proposed to revise §§ 105.5, 107.1, 107.113, 107.117, 107.709; add a new Appendix A to 49 CFR part 107, entitled "Standard Operating Procedures for Special Permits and Approvals;" and revise § 171.8 to incorporate administrative procedures for processing special permits and approval applications. On September 12, 2014 (79 FR 54676), PHMSA published a correction to the August 2014 NPRM to propose that special permit and approval applications that undergo review by an Operating Administration (OA) will complete this review before they undergo an automated review. This proposed correction also clarified that an OA review, depending on its completeness, may negate the need for the automated review. We have summarized these proposed actions below.

§ 105.5

In § 105.5, we proposed to revise the definitions for "approval" and "special permit" to clarify that an approval and special permit may be issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR.

§ 107.1

In § 107.1, we proposed to revise the definitions for "approval" and "special permit" to clarify that an approval and special permit may be issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR. In addition, we

proposed to add for clarity new definitions for “applicant fitness,” “fit or fitness,” “fitness coordinator,” and “insufficient corrective action.”

§ 107.113

In § 107.113(a), we proposed that the Associate Administrator will review all special permit applications in conformance with standard operating procedures proposed in new 49 CFR Part 107, Appendix A.

§ 107.117

In § 107.117(e), we proposed that the Associate Administrator will review all emergency special permit applications in conformance with standard operating procedures proposed in new 49 CFR Part 107, Appendix A.

§ 107.709

In § 107.709(b), we proposed that the Associate Administrator will review all approval applications in conformance with standard operating procedures proposed in new 49 CFR Part 107, Appendix A.

49 CFR Part 107, Appendix A

In 49 CFR part 107, we proposed to add new Appendix A to incorporate PHMSA’s existing standard operating procedures for processing special permits and approval applications. These procedures can be defined in four phases consisting of: Completeness, Federal Register Publication, Evaluation, and Reconsideration.

§ 171.8

In § 171.8, we proposed to revise the definitions for “approval” and “special permit” to clarify that an approval and special permit may be issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise prescribed in the HMR.

As stated earlier, PHMSA published a correction notice on September 12, 2014. In this notice, PHMSA added language to the proposed “Automated review” and “Safety profile review” sections of the proposed SOPs to clarify that special permit and approval applications that undergo a safety profile review by an OA will complete this safety profile review before they undergo an automated review, and that an OA review, depending on its completeness, may negate the need for the automated review, respectively.

In response to the NPRM, PHMSA received comments from six entities. These comments and PHMSA’s responses are provided in the “Comment Discussion” section of this final rule.

III. Comment Discussion

In response to the August 12, 2014 NPRM, and September 12, 2014 proposed rule correction notice, PHMSA received comments from the following organizations:

Name	Docket Number	Website Link
American Trucking Associations	PHMSA-2012-0260-0007	http://www.regulations.gov/#!documentDetail;D=PHMSA-2012-0260-0007
Chlorine Institute	PHMSA-2012-0260-0008	http://www.regulations.gov/#!documentDetail;D=PHMSA-2012-0260-0008
Dangerous Goods Advisory Council	PHMSA-2012-0260-0011	http://www.regulations.gov/#!documentDetail;D=PHMSA-2012-0260-0011
Institute of Makers of Explosives	PHMSA-2012-0260-0006	http://www.regulations.gov/#!documentDetail;D=PHMSA-2012-0260-0006
Reusable Industrial Packaging Association	PHMSA-2012-0260-0009	http://www.regulations.gov/#!documentDetail;D=PHMSA-2012-0260-0009
Sporting Arms & Ammunition Manufacturers’ Institute	PHMSA-2012-0260-0010	http://www.regulations.gov/#!documentDetail;D=PHMSA-2012-0260-0010

In this section, we summarize and discuss the comments received. You may access the NPRM, correction notice, comments, and other documents associated with this rulemaking by visiting the Federal eRulemaking Portal at <http://www.regulations.gov>, under Docket No.

PHMSA-2012-0260, and specific comments by visiting the website links listed in the previous table.

A. American Trucking Associations

Motor Carrier Exposure

The American Trucking Associations (ATA) expressed concern that the criteria PHMSA is using to reject applications during its automated tier and fitness application review processes will adversely penalize large fleets that transport materials more often. The ATA stated the chances for errors to occur in transportation increase proportionally as a carrier's frequency in transportation increases. Further, the ATA stated that many of the criteria PHMSA says it will use to conduct its initial evaluations will cause carriers' applications to be rejected for violations proven to be poor indicators of safe transportation performance. The ATA believes PHMSA's focus on these types of violations is not justified and offers the following in support of its position:

“In 2012, hazardous materials carriers had four percent fewer crashes per truck tractor than traditional fleets. Fleets transporting hazardous materials also had thirty-five percent fewer inspections resulting in a driver being taken out of service, and fourteen percent fewer inspections resulting in a vehicle being taken out of service. Yet even accounting for the hazardous materials fleets' superior safety performance, once a fleet reaches a certain size it is almost impossible that it will not have suffered an accident involving a death, injury, or property-damaging tow away due simply to exposure and the laws of probability. These carriers are almost guaranteed to fail the automated review process.

These carriers likely will not pass during the proposed Section 3(b)(ii) safety profile review either. At this point, PHMSA proposes that the fitness coordinator review “the applicant's history of prior violations, insufficient corrective actions, or evidence that the applicant is at risk of being unable to comply with the terms of an application for an existing special permit, approval, or the HMR[s].” PHMSA proposes that carriers' accidents caused merely by “driver error” can be dismissed at this point. However, a fitness coordinator is unlikely to be able to review enough of a carrier's accident data to make such a determination off-site. The fitness coordinator will therefore likely recommend that the motor carrier applying for a special permit move on to the final level

of review: an on-site inspection. During an on-site inspection, the inspector will have access to the carrier[']s accident reports and any other pertinent safety information and would be able to clear the carrier for a special permit.

In 2012, 3,702 fatal crashes involving large trucks were reported to the Department of Transportation (DOT). DOT further estimates another 367,000 crashes involving large trucks that resulted in injury or property damage only [occurred during this period]. In 2012, large trucks traveled an estimated 268,318,000,000 miles. Thus, on average and based on DOT figures, a large truck is involved in a traffic accident every 1.4 million miles.

ATA has only presented the data concerning crashes. However, PHMSA also proposes to remove those with two or more violations of its placarding regulations from automatic review and approval eligibility. In calendar year 2013, placarding violations were the seventh most common hazardous materials violation cited. Inspectors issued just under 2,300 violations in 2013. PHMSA proposes to check roughly 10,000 placarding violations over a four year period. A carrier—particularly a large one—might easily have two or more of those 10,000 violations. ATA also questions why two placarding violations should automatically send a carrier to secondary review when the six more frequently cited violations—especially failing to secure the package in the vehicle, damaged/deteriorated/obscured placards, and failure to carry shipping papers at all—have no similar effects on special permit or approval eligibility.

Ultimately, a carrier in the scenario described above is likely to receive approval for the special permit. Unfortunately, the carrier must comply with multiple levels of increasingly intrusive reviews in order to do so. Rather than require motor carriers to submit themselves to such levels of observation, ATA suggests that PHMSA implement a system that controls for both fleet size and for fleet utilization. Such a system should also include realistic violation levels for carriers of all sizes that are derived from examining FMCSA [Federal Motor Carrier Safety Administration]-provided data about violations during any given year.”

PHMSA agrees with the ATA that those who transport hazardous materials frequently, including carriers with larger fleets, may be at greater risk¹ for involvement in transportation incidents due to their increased opportunity to be exposed to occurrences that affect safety in transportation (e.g., other vehicles, road conditions, weather, vehicle integrity, driver health, driver experience, etc.). PHMSA also agrees that a fitness assessment program which includes

¹ Website: Federal Motor Carrier Safety Administration’s Large Truck and Bus Crash Facts -- <http://www.fmcsa.dot.gov/safety/data-and-statistics/large-truck-and-bus-crash-facts>.

incident data proven to be an indicator of safe performance will assist with the process of performing a Section 3(b)(ii) safety profile review. However, PHMSA notes that the issuance of special permits and approvals is unique in that they authorize activities involving hazardous materials not currently permitted under the HMR. To ensure their safe performance, PHMSA must assess the safety of the tasks requested and the ability of the person(s) making the request to successfully perform these tasks. PHMSA assesses the safety of the tasks requested by subjecting them to technical review by its Engineering and Research Division and/or appropriate OA's, as applicable. PHMSA assesses the ability of the person(s) to perform the tasks requested successfully based on recommendations it receives from its Field Services Support Division and OA's. These staff are most closely linked to the acquisition and use of this data, from incident reports submitted in conformance with §§ 171.15 and 171.16 and data that is developed and managed by the FMCSA and PHMSA's evaluation and risk management teams. Identifying and evaluating appropriate fitness screening criteria and available data is the center of PHMSA's risk management strategy.

Further, while other databases exist within the DOT and the federal government that contain additional hazmat transportation safety information that may be useful in a safety profile review, PHMSA does not have access to these databases at this time. In addition, the databases PHMSA currently uses are either not configured to retrieve or do not contain some of the information and normalizing controls the ATA has requested be included in the safety profile review. Nonetheless, PHMSA agrees with the ATA that these types of data collection changes will improve § 3(b)(ii) of 49 CFR Part 107, Appendix A's safety profile review results, and reduce the opportunity for frequent shippers and carriers of hazardous materials from being adversely affected during the safety profile review process. Therefore, in the future PHMSA will

continue to study what factors are proven indicators of safe hazmat transportation performance for the purposes of a safety profile review, and review its data systems, software programs, and data collection to include those safety indicators that can reasonably be obtained.

PHMSA disagrees with the ATA's statement that a fitness coordinator may not be able to review enough of a carrier's accident data information to make an offsite fitness determination of that carrier. In most instances before an on-site safety profile review is considered, PHMSA's fitness coordinators will contact the applicant for clarifying information. If the information the applicant provides is sufficient to address the coordinators' concerns and/or questions, this may eliminate the need for an on-site inspection.

PHMSA disagrees with the ATA's statement that PHMSA proposes to remove all carriers with two or more placarding violations from automatic review and approval eligibility. Specifically, the NPRM proposed to remove carriers from automated review and approval eligibility if they have two or more placarding violations involving materials with hazard classes listed in Table 1 of § 172.504(e). Historically, materials that meet the hazard classes listed in Table 1 of § 172.504(e) pose significantly higher risks in transportation. Thus, PHMSA believes additional scrutiny regarding transportation violations involving these materials is justified. The ATA also believes placarding violations involving Table 2 materials should not automatically send a carrier to secondary review. As stated in the revised SOPs, PHMSA will address placarding violations under FMCSA fitness criteria by not considering placarding violations involving § 172.504 Table 2 materials.

PHMSA also agrees with the ATA that a safety profile review should put greater weight on serious and not minor violations. Citing the violations listed on FMCSA's "Roadside

Inspections/Hazmat Violations” webpage², the ATA believes the six violations that occur most frequently are associated with more safety risks in transportation. These violations, listed in descending order of frequency, are:

1. Package not secured in vehicle;
2. No copy of USDOT hazmat vehicle registration number;
3. Placard damaged, deteriorated, or obscured;
4. Shipping paper accessibility;
5. No shipping papers (carrier); and
6. Vehicle not placarded as required.

Of these six, the ATA believes three—failing to secure the package in the vehicle, damaged/deteriorated/obscured placards, and failure to carry shipping papers—should take precedence over placarding violations involving § 172.504(e), Table 2 materials.

PHMSA further agrees with the ATA that inspection violations should be categorized in one of two triggers that also distinguish between greater and lesser transportation risks.

Therefore, as proposed in the NPRM, PHMSA is reducing the number of levels that initiate, also called “trigger,” a safety profile review to remove enforcement case referrals and incidents involving foreign cylinder manufacturers or requalifiers, and revising the safety profile review triggers to include incorrect package selection, leaking packages, failure to secure package, damaged/deteriorated/obscured placards, failure to carry shipping papers, not following closure instructions, and blocking/bracing problems. PHMSA is also revising the violations that trigger an on-site inspection to include marking, labeling, placarding, and shipping paper violations.

PHMSA will determine applicants as having failed the safety profile review if they are found to

² Federal Motor Carrier Safety Administration Analysis & Information Division, “Roadside Inspections, HazMat Violations” (website: <http://ai.fmcsa.dot.gov/SafetyProgram/spViolation.aspx?rpt=RDHV>).

have any of the safety profile review violations described earlier in this paragraph. PHMSA believes these changes will lead to safety profile reviews that are more indicative of applicants that may cause compromises in safety. Further, PHMSA is revising the text in 49 CFR Part 107, Appendix A, to remove language that states carriers with two § 172.504(e), Table 2, placarding violations, and applicants with more than two safety profile review trigger violations or more than five on-site inspection trigger violations that have occurred during the four years prior to applying for a special permit or approval are automatically subject to a secondary review. PHMSA made this revision because it lacks the software capability to discern these incidents during an automatic review.

Safety Performance Data

The ATA also commented that the NPRM “proposes that highway carriers ‘will be screened in an automated manner based upon criteria established by FMCSA...which consists of interstate carrier data, several states’ intrastate data, interstate vehicle registration data, and may include operational data such as inspections and crashes.’ PHMSA proposes that FMCSA’s Safety and Fitness Electronic Records (SAFER) system or another system like SAFER, but chosen by FMCSA, will be used.” The ATA believes safety data is better reflected in a company’s inspection information and crash history. It also recommends that PHMSA consult only the underlying data to the index scores if the validity of the index scores cannot be verified. The ATA recommends that PHMSA base its SOP fitness evaluation criteria on categories FMCSA has determined are better indicators of a motor carrier’s safe performance. The ATA further states:

FMCSA has developed a new safety measurement tool, known as Compliance, Safety, Accountability (CSA). CSA utilizes the inspection and crash data that PHMSA proposes

should be considered in making special permit determinations. The CSA system then amalgamates that data and runs it through an algorithm in order to generate seven index scores ranking motor carriers in relation to other carriers of similar size or with a similar number of inspections. But, PHMSA's special permit and approvals requirements are based upon applicants showing that safety performance will be at the same or a higher level than would prevail outside of the special transportation provisions requested. Thus, CSA scores should only be used if they can be shown to reliably represent individual carrier safety performance.

Many of the individual, discrete pieces of data utilized by the CSA algorithm could be useful to PHMSA in making a determination about a carrier. These pieces of information could be useful with only an automated review or at the safety profile review by a DOT official. However, multiple studies have shown that FMCSA's overall aggregate indexing and scoring system does not accurately or reliably represent an individual carrier's safety performance or reliably predict future crash involvement. Essentially, the scores are not good indicators as to whether or not a carrier "is fit to conduct the activity [that would be] authorized by the special permit or approval application."

FMCSA even avoids using CSA scores in awarding Hazardous Materials Safety Permits (Safety Permit). Safety Permits are required for the transport of highway route-controlled quantities of Class 7 hazardous materials, certain high explosives, poison inhalation hazards in Zones A-D, and shipments of compressed or liquefied natural gas. Rather than utilize CSA scores, FMCSA awards safety permits based on a carrier's performance in avoiding crashes and out of service orders during vehicle, driver, and hazardous materials inspections.

Wisely, FMCSA is unwilling to award Safety Permits based upon CSA scores. In fact, several carriers that hold Safety Permits have CSA Hazmat BASIC index scores well above the threshold for agency intervention. Therefore, it is inappropriate for PHMSA to rely on these same index scores eschewed by FMCSA in approving or denying special permit or approval applications. PHMSA can and should rely on inspection information and crash history. However, absent verification that the index scores contain useful safety information, only the underlying data should be consulted.

As stated earlier in this preamble, PHMSA agrees with the ATA that data considered when evaluating an applicant's safety profile should be an indicator of the applicant's safe performance in transportation. PHMSA further agrees that while an increased number of miles in transportation must be considered when evaluating transportation safety, companies should not be adversely penalized for placing an increased number of properly prepared hazardous materials in transit. PHMSA proposed in the NPRM to evaluate an applicant's fitness based on

accident and other operational data that are historical indicators of compromises in hazardous materials transportation safety. While PHMSA proposed to use FMCSA’s CSA data as a part of this evaluation, PHMSA is aware of the FMCSA’s concerns about its data collection programs and that it is considering revising the type of information it collects. PHMSA will investigate its data collection systems and confer with FMCSA to determine what safety compromise indicators can be retrieved from these databases, and if the normalizing controls of the type the ATA discussed may also be obtained. In addition, the initial review of the data will only be performed as part of the initial automated fitness review. Further review, including the safety profile review, will be conducted by a fitness coordinator and the data will be evaluated and normalized based upon available data during the review. Companies will not be determined to fail the safety profile review based solely upon the number of incidents or accidents that were discovered during the safety profile review process. Additional factors, such as the number of miles traveled and the number of vehicles in service, would also be considered.

As stated earlier in this preamble, PHMSA also proposed in the NPRM to modify its evaluation of the information needed to warrant a safety profile review into two types of initiating/trigger/tier events. The first event is for a safety profile review and emphasizes high-level indicators of these types of risks, and the second event is for on-site inspections and includes violations that PHMSA finds are low-level risk model indicators. In the NPRM, these proposed events were described in the following table:

TABLE 2 SAFETY PROFILE REVIEW AND ON-SITE INSPECTION TRIGGERS

Trigger for Safety Profile Review	Trigger for On-Site Inspection*
Death or Injury	Any incident attributable to the applicant or package

§ 172.504(e) Table 1 (Placarding) material AND Two or more Incidents	(not driver error)
Bulk AND Three or more Incidents	
Two or More Prior Enforcement Case Referrals	Insufficient Corrective Actions on any enforcement case OR Independent Inspection Agency (IIA) Items (Except when reinspected with no violations noted)
Foreign Cylinder Manufacturer Or Requalifier	Never Inspected under current criteria (2010)

* The Fitness Coordinator assesses and applies these triggers.

PHMSA will consider additional high-level indicators of transportation safety compromises, such as wrong package selection, failure to close packages properly, and failure to test packages.

Due to their low risk, PHMSA will not include violations it finds are low-level risk model indicators, such as those described in the triggers for an on-site inspection in the earlier table, as triggers for an applicant's on-site inspection. Also as previously stated, if PHMSA finds during an inspection evidence that an applicant in the four years prior to submitting its application has not implemented sufficient corrective actions for prior violations, or is at risk of being unable to comply with the terms of an application for a special permit or approval, an existing special

permit or approval, or the HMR, PHMSA will recommend that the applicant has failed this portion of the safety review process.

B. The Chlorine Institute

General Comments

The Chlorine Institute (CI) expressed its overall support of PHMSA's initiative to incorporate the special permits and approvals SOPs and information about the evaluation process into the HMR. It stated that by putting this information in the public record and into the HMR, it allows stakeholders to be more informed about the special permit and approvals application process. In addition, CI stated that explaining the evaluation process and what criteria will prompt interviews and on-site inspections will assist applicants in being more prepared for the evaluation process. Further, CI stated that providing stakeholders with such details should make for a smoother and more efficient application review process, thereby benefitting both PHMSA and industry. Finally, the CI expressed its appreciation that PHMSA has listened to industry's concerns pertaining to the special permits and approvals review process and undertaken this rulemaking.

C. Dangerous Goods Advisory Council

General Comments

The Dangerous Goods Advisory Council (DGAC) expressed its support of PHMSA's efforts to comply with MAP-21 requirements to issue regulations that establish SOPs and criteria to evaluate applications for special permits and approvals, in addition to the publishing of the

SOPs. However, the DGAC also expressed concerns about several proposals in the NPRM, and requested that PHMSA revise its SOPs to reduce possible subjectivity and processing times.

PHMSA's Responses to Routine Requests

The DGAC commented that the procedures PHMSA proposed for managing special permit and approval applications do not provide for responding to routine requests for administrative revisions, such as name changes, address updates, or minor editorial revisions to correct non-substantive errors. The DGAC believes requiring applicants to submit an entire application to make such minor changes does not promote safety and burdens PHMSA's and the applicant's administrative processes.

PHMSA disagrees. When an applicant asks to modify an existing special permit to make routine administrative changes, such as a change of address and/or minor editorial revision to correct a non-substantive error, paragraphs (c) and (d) of § 107.105 require that the applicant requesting this change submit an application to PHMSA that describes and justifies their request and includes information relevant to the proposal, which is a "full" application for this type of request provided it complies with all applicable requirements of the HMR. Since the special permit is already approved, depending on the type of request, all the safety justification information required in the initial application will not be needed. Relevant information to the request is also what is needed to make routine administrative changes to an existing approval, but the language in § 107.705(b) is not as clear. Therefore, PHMSA is revising the introductory paragraph of § 107.705(c) to include language similar to that in § 107.105(c) that requires relevant information be submitted with the request. As a result, PHMSA believes making requests for modifications through the submission of a full application, as prescribed in the

HMR, is not a significant burden. In addition, providing a full application does serve a safety benefit since it will require the application to be screened through an automated fitness review that will identify any possible changes to the company's fitness profile. Regarding requests for name changes, additional information is needed since PHMSA technically does not issue "name changes" to permits and approvals. The applicant requesting a company name change must be able to demonstrate that the new company is performing the activities authorized under the special permit or approval in a manner that is identical to that of the previous company. For example, the applicant must provide a filing from the state of incorporation indicating that the only change to the corporation is a change in the name, or other documentation to indicate that although the company is changing, its personnel, procedures and activities performed under the special permit or approval will not change under the auspices of the new company. If these conditions are met, then PHMSA grants an approval or permit to the new company that it may maintain the same approval or permit number as the one previously issued.

Further, though PHMSA continuously strives to improve the efficiency of its special permit and approval processing operations, it is the applicant's responsibility to ensure his or her application is correct and complete. PHMSA receives approximately 30,000 special permit and approval applications annually. One of the most effective ways to ensure efficient processing of an application is that it is complete. Past attempts by PHMSA to delay processing incomplete applications until it received the missing or corrected information from applicants resulted in significant application processing delays. If applicants are permitted to submit incomplete applications without any negative consequences, there is no incentive for applicants to submit complete and conforming applications. Requiring applications to be complete prior to processing will enhance PHMSA's ability to process the applications in a timely manner. The

time that would be utilized gathering additional information and updating applications could be used more effectively by processing complete applications. Further, budgetary constraints prevent PHMSA from modifying its current application processing software. Therefore, PHMSA will not create a separate application process for managing routine administrative application changes.

Assessment of Manufacturers That Do Not Ship

DGAC stated that it is not clear about the intent of PHMSA's request on how to assess hazardous materials manufacturers that do not ship. Specifically, the DGAC states that it is not clear what PHMSA's jurisdiction is to assess fitness for entities that do not offer hazardous materials or packaging marked as acceptable for transportation.

PHMSA disagrees. While the DGAC correctly points out that the HMR do not apply to a hazardous material that is not being transported in commerce, the HMR apply to all actions that affect the safe transport of hazardous materials in commerce, including those performed by manufacturers that do not ship, such as hazard classification and consignment through a freight forwarder or broker. Therefore, each applicant for a special permit or approval must be assessed for its fitness to perform actions relevant to compliance with the HMR. For those manufacturers that do not perform a hazmat function, PHMSA does not have regulatory jurisdiction over these entities. PHMSA believes that clarifying the responsibilities under the HMR of manufacturers that do not ship is beneficial to this process.

Necessity of Assessments of Applicants Performing Functions that Require Registration

The DGAC questioned the necessity for making fitness determinations of applicants that perform certain functions requiring registration. As an example, DGAC stated that persons desiring to use a symbol as their company identifier must register with PHMSA and be issued a number. DGAC stated that performing a fitness determination on these persons seems to serve no useful purpose. For persons who perform only visual inspections of cylinders that are required to register to receive a Visual Identification Number (VIN), the DGAC expressed doubt that PHMSA has an inspection history on the vast majority of these individuals, and that PHMSA can perform an on-site inspection of all applicants for VINs in a timely manner. The DGAC concluded by stating that withholding the issuance of a VIN until an inspection can be performed may cause severe hardship for such applicants, and affect their ability to stay in business.

PHMSA disagrees. While it is not our intent to inspect all VIN applicants, and historically we have found low levels of risk with visual cylinder requalifiers, visually inspecting cylinders is a safety function under the HMR. Therefore, PHMSA will analyze VIN applicants for fitness if PHMSA is aware of any intelligence that the applicant is not capable of performing this activity. Further, the average processing time for a VIN is 3 to 5 days or less. PHMSA has never had delays in processing these applications. However, PHMSA is reviewing how we process these applications to determine if we can implement more automation.

Authority to Determine Sufficient Corrective Action

The DGAC expressed concern regarding the authority the proposed SOPs would give the PHMSA Field Operations (FOPS) officer or authorized Operating Administration (OA) representative to make a subjective determination that corrective action taken by an applicant in

response to a prior enforcement case is insufficient and that the basic safety management controls proposed for the type of hazardous material, packaging, procedures and/or mode of transport remain inadequate. DGAC stated that such a determination by a single individual is purely subjective without a determination that a violation continues to exist. Further, DGAC believes that this type of determination lacks both the administrative and legal review to verify existence of a violation, and the administrative processes for a company to challenge such findings.

PHMSA disagrees. Fitness is not determined by one FOPS Division staff, or a representative of the Department, such as an OA representative. An applicant that undergoes an initial safety profile review and is flagged has his or her case first reviewed by a FOPS officer, and then the case goes through a second level review. Further, a company has 30 days to submit corrective actions after a FOPS officer or OA investigator finds possible violations. If the first-line field supervisor considers the corrective actions sufficient to address the observed violation, the supervisor presumes that corrective actions have been put into place and will prevent future recurrence. In some instances, a follow up re-inspection is also executed to ensure the corrective actions have adequately addressed the problem. All field case reports, including corrective actions, are reviewed by PHMSA's legal counsel and a final penalty is assessed. The penalty amount can be challenged by the company under existing administrative processes. Further, for additional clarity and in response to a request from commenters, PHMSA has added a definition for "sufficient corrective action" under § 107.1.

Criteria Used to Determine if an Applicant is "Fit" or "Unfit"

DGAC states that it remains unclear as to what criteria will be used to determine if an applicant is either “fit” or “unfit.” It also states that even though minor violations of the HMR may be uncovered during an on-site investigation, such violations may not have a serious impact on the compliance posture of the applicant. The DGAC recommends that PHMSA clearly articulate the conditions under which an applicant would be determined to be “unfit.”

PHMSA has articulated these conditions to the extent possible in this final rule. However, too many variables exist among those who affect the safe transport of hazardous materials to state with certainty what HMR violations or previous incident history will be found and to what extent they will affect the status of an applicant’s fitness. For example, if a violation or series of previous incidents is found and PHMSA determines the applicant has not implemented sufficient corrective actions for prior violations, or that the applicant is at risk of being unable to comply with the terms of an application for a special permit or approval, an existing special permit or approval, or the HMR, then PHMSA will determine that the applicant is unfit to conduct the activities requested. Although FOPS officers and OA representatives do not disclose their inspection process and their inspections are unannounced, their inspections are conducted in a logical sequence and involve all aspects of the applicants’ operations that are applicable to the HMR.

D. Institute of Makers of Explosives

General Comments

The Institute of Makers of Explosives (IME) expressed concern that the SOPs proposed in the NPRM introduce practices and procedures that increase the costs and timelines of producing and managing special permits and approvals applications without addressing the

fundamental problems the DOT Office of Inspector General (OIG) identified with these PHMSA programs -- deficiencies in how PHMSA manages its paperwork and provides clarity when processing these applications. The IME stated the DOT OIG directed PHMSA to clarify and publish its SOPs for special permits and approvals in its 2009 report. The IME also stated the DOT OIG cited as the reason for this directive PHMSA's deficiencies in managing its paperwork, but not for the performance of tasks PHMSA authorized in the special permits and approvals it has approved. The IME further stated PHMSA responded to the OIG's request by issuing "without public notice and comment, two documents describing new complex procedural schemes that substantively altered the special permit and approvals application and evaluation process, and fundamentally changed the procedures the agency would follow in conducting a fitness determination."

The IME further noted that although PHMSA identified its SOPs as "a process for evaluating an applicant's fitness," it identified its SOPs for approvals "as a draft with a 'to be determined'" placeholder for its fitness determination standard. The IME stated that the agency began using these SOPs to make regulatory determinations of fitness although the regulated community had no idea what threshold level of performance would be used to determine an applicant's "fitness." The IME stated the regulated community responded to this action "with letters and a petition for rulemaking requesting that PHMSA establish its SOPs and fitness criteria by rulemaking." When PHMSA rejected these requests, the IME stated, "Congress intervened with a directive that PHMSA issue regulations to establish SOPs for the SPAP [Special Permit Application Process], and objective criteria to support the evaluation of special permit and approval applications."

As stated earlier in this preamble, PHMSA continuously strives to improve the efficiency of its special permit and approval processing operations while processing approximately 30,000 special permit and approval applications annually. In the past, delays in processing incomplete applications until PHMSA received missing or corrected information from applicants resulted in significant delays in processing applications. As a result, PHMSA has ceased that practice. PHMSA must also ensure that all special permit and approval requests are not authorized until they are determined to be as safe as those activities permitted under the HMR or are determined to be safe enough to serve the public interest. In addition, by undertaking this rulemaking process, PHMSA is responding to requests from the regulated public to open the development of its special permit and approval SOPs to full public disclosure and comment.

Concerns and Observations About the NPRM

The IME indicated in its comments that it supports several proposed amendments in the NPRM. These include a four-year review period, Table 1 applications, hazmat registration, party-to-applicant fitness, data normalization and relevance, and presumption of fitness. However, the IME provided several comments pertaining to a number of concerns and observations. They are as discussed below.

Costs and Benefits

In its comments, the IME stated that PHMSA's claim that costs and benefits are unaffected due to this rulemaking is premature. Specifically, it stated that "every determination PHMSA makes of an applicant's fitness or whether to issue or deny a special permit or approval has an effect outside of the agency. Furthermore, opportunities to affect those costs and benefits

change when the procedures and standards change. For several years, the regulated community has relied on SOPs posted on PHMSA's webpage. Yet PHMSA acknowledged, at some time after its 2012 public meeting on fitness determination standards, that it has revised its SOPs. It may be that the agency's claim that the SOPs and fitness criteria described in the rulemaking are unlikely to change costs and benefits is because PHMSA is describing its current practices, not the SOPs posted to its website. Whatever the case, a declaration that costs and benefits are unaffected is premature because it presupposes the outcome of this rulemaking."

PHMSA notes that for several years, Congress and the DOT's Inspector General (IG) have directed PHMSA to assess the ability (i.e., fitness) of special permit, and more recently approval, applicants to ensure they can safely perform the tasks requested in their applications. PHMSA developed and revised its SOPs as internal administrative guidance to help its staff properly process these applications, reduce delays, and accommodate changes to automated systems, database availability, and DOT and PHMSA directives. PHMSA also recognizes the financial impact special permits and approvals have on industry processes. However, as mentioned earlier in this preamble, the risks associated with hazardous materials and the potential for severe consequences to the public and environment if they are improperly transported require that PHMSA must not authorize permission to transport these materials in a manner not permitted under the HMR until PHMSA ensures that the actions requested and the persons performing these actions are safe.

Streamlining the Process

The IME also expressed its concern of how "backlogged" applications have plagued the SPAP since the events of 2009. It noted that:

PHMSA exercises new authority to incorporate proven special permits into the HMR. Backlogs from this part of the SPAP may be self-correcting. While IME appreciates the dedication of PHMSA staff to move existing backlogged applications, the frequency with which intervention is required to request action on these applications suggests that the process needs to be better streamlined. PHMSA has established a 120-day processing schedule before an application can be deemed “backlogged.” We do not believe that every application should be held to a 120-day processing schedule, and we associate ourselves with those that believe the length of time PHMSA takes to process and issue special permits or approvals, especially when applications lag beyond the current 120-day processing threshold, adversely impacts U.S. competitiveness. While nothing in this notice indicates that the regulated community can expect a shorter processing schedule, the agency does describe revised procedures that suggest a shorter timeframe is possible. For example, PHMSA has begun to concurrently process both the technical and the fitness evaluations. Based on concurrent processing, PHMSA should establish a shorter timeframe for applicants to gauge when they will be provided a decision from the agency.

In another streamlining initiative, PHMSA issued notice that it was ceasing to perform fitness reviews for classification approvals. These approvals are simply affirmations of compliance with classification regulations. Those affected must have PHMSA-required tests performed by PHMSA- approved laboratories. Denying a request for such an approval on the basis of fitness is, in effect, denying the applicant the opportunity to properly classify a material in accordance with the applicable regulations. While we support this policy initiative, PHMSA left open the door for interpretive confusion with a concluding statement that, “[f]itness of applicants for classification approvals will continue to be reviewed through application evaluation, inspection, oversight and intelligence received from PHMSA or another Operating Administration (FAA, FMCSA, FRA, or USCG).” This statement appears to contradict the announced policy that fitness determinations would not be required for classification applications. PHMSA should clarify its policy as part of this rulemaking.

PHMSA states that there are four steps in the processing of an application, whether for special permits or approvals. They include a “completeness” phase, publication, “evaluation” phase (which includes both a technical and a fitness evaluation), and “disposition” phase. The completeness phase is to determine if the application contains all the information required by the HMR. However, the preamble states that evaluation phase is used to “determine if the application is complete.” This duplication is needless and will slow the processing of the application. Additionally, it is not clear from the preamble discussion when applicants will be notified that an application is rejected. Reasons to reject applications, such as incompleteness, omissions, errors, could be manifest at any stage of the processing phases. Whenever PHMSA makes a determination to reject an application, the applicant should be immediately notified. An application tagged to be rejected should not continue to move along the processing queue only to be rejected at some later date.

PHMSA has stated that it queues applications on a “first come, first served” basis. While we support this prioritization principle, it does not recognize the fact that applications are

different and, once in the system, applications should be assigned to separate tracks and staff who specialize in the processing of application types. For example, it seems intuitive that classification approvals with a 3-part review process without the need for Federal Register publication or a fitness determination would require less time to complete than special permit applications with a 5-part process which includes Federal Register publication and a fitness determination. PHMSA should accommodate these distinctions with a shorter processing schedule.

Likewise, IME has long advocated for a separate track to process applications seeking minor corrections, such as name changes, or those with minor errors, such as misspellings, or omissions. However, PHMSA states that it has a “new” practice of rejecting “incomplete” applications. The agency states that “problems with recordkeeping” require the resubmission of the entire application, with corrections, in order for a rejected application to be reconsidered. This is a costly, ineffective way for PHMSA to get around problems it has with recordkeeping. The policy may make it easy for PHMSA to clear its books, as all the costs of resubmittal, including lost commercial opportunity costs, are borne by the applicant. While we agree that incomplete applications and applications containing non-substantive errors should be tabled pending correction, we do not believe that these types of administrative deficiencies warrant returning resubmitted applications to the end of the queue and restarting the processing time-frame anew. Rather, we suggest that PHMSA establish a dual-track system, allowing applicants of incomplete applications or those otherwise tagged to be rejected for non-substantive reasons a grace period, such as 30 days, to correct the deficiency(ies) identified in the application. If the applicant resubmits a corrected application, the application should be returned to the point in the queue where it was pulled. If the applicant fails to resubmit requested information in the time allowed, the application should be rejected and any resubmittal treated as a new application.

In what could be seen as process streamlining, PHMSA states that it “will review companies with multiple locations as one organization, placing an emphasis on its examination of the company’s locations where the requested actions and/or processes are being performed.” However, the announced policy seems contradictory. A company with multiple locations is not being reviewed as one organization if, at the same time, PHMSA is examining locations where the safety permit or approval is to be carried out. If PHMSA means some type of middle ground, it should clarify how many “locations” within a company will be visited and how the locations will be selected.

It is important that PHMSA look for opportunities to streamline its 120-day special permit and approval processes. In each of the last four fiscal years, PHMSA has requested Congress to authorize millions in user fees to pay for the costs to administer the SPAP. SPAP users have resisted efforts to impose these fees for many reasons. One key reason is that PHMSA has done nothing to restrain its own costs within the program. Meanwhile, we are grateful that Congress has rejected these budget requests.

While PHMSA requests that applicants submit their special permit and approval applications 120 days before they would like them to be issued, PHMSA is not restricted by this timeline. Typically, it takes PHMSA less than 180 days to process a special permit application, approximately 45 days to process an approval classification, and approximately 5-6 days to process a VIN application provided all are correct and complete. While PHMSA agrees that the application process should be streamlined to the extent possible, PHMSA must take what time is needed to efficiently and effectively determine that the actions requested in each application are safe and what modifications, if any, may be needed to make the requested actions safe. PHMSA believes that it must consider applications as they are received to be fair to those applicants who have prepared their applications correctly. PHMSA disagrees with the IME and other commenters that establishing grace periods for applications with missing information will improve its ability to streamline its application process. Past efforts to create internal systems that did this significantly delayed PHMSA's ability to process applications efficiently. Further, budgetary constraints prevent PHMSA from modifying its current application processing software to create a separate application process for managing routine administrative application changes.

Over the past 10 years, approximately 10 percent of PHMSA's special permit applications have been in processing for greater than 180 days. PHMSA must report applications that are not processed within 180 days in the Federal Register. PHMSA agrees that whenever an application fails any stage in the process, this failure should trigger immediate notification to the applicant to avoid excessive delays. To improve the transparency of this process, PHMSA has developed and is testing an online process for submitting and checking on the status of special permit and approval applications. This online system is being designed to

notify applicants when their applications have failed to meet the required criteria. Once the testing is completed and the software is performing correctly, PHMSA will make this online information available to the general public. This online method should also improve times for issuing “M” and “VIN” numbers, and renewals.

PHMSA disagrees with the request to reduce processing times by no longer publishing notifications of applications received in the Federal Register. PHMSA is required by law to provide public notification in the Federal Register of its receipt of special permit applications only (see §§ 107.113(b) and (j), and 107.117(g)).

Regarding screening applicants with multiple locations as one entity, PHMSA agrees. PHMSA already performs its initial screening of these applicants as one entity; however, follow-up reviews are more site-specific, based on the number of locations and resource availability.

PHMSA also agrees with the IME that the language explaining the difference between the completeness phase to determine if the application contains all the information required by the HMR, and the evaluation phase to determine if the application is technically complete, is confusing. Further, the NPRM’s preamble stated the evaluation phase will be used to “determine if the application is complete.” This duplication is needless and will slow the processing of the application. Therefore, in this final rule PHMSA is revising the Appendix to clarify the difference between the completeness phase and the evaluation phase.

Fitness Determination Procedure

The IME also expressed concern with the procedures and policies PHMSA is using to determine “fitness.”

PHMSA states that “incorporating an elaborate review system into the HMR ... would be extremely difficult [given] the wide range of applicants.” PHMSA is not alone in the

realization that establishing standards to fairly and accurately determine fitness of a myriad of private entities is a daunting task. The Federal Motor Carrier Safety Administration (FMCSA) has been attempting to update its fitness standards for years. However, PHMSA proposes to overcome the difficulty of this task by “incorporat[ing] a more straightforward, user-friendly review system.” While we can hope for a process that is straightforward and user-friendly, first and foremost PHMSA needs to accurately disclose the process and standards it is using.

As stated earlier in this preamble, PHMSA will conduct most of its safety profile evaluations through administrative research. PHMSA will conduct its site-specific and situational-dependent safety profile evaluations based on highest priority with regard to safety risk, and the number of locations and availability of agency resources to perform these tasks.

Fitness Determination Frequency

The IME commented on the frequency of fitness determinations when it stated that:

IME recommended that fitness determination reviews not be triggered by the filing of an application but be periodically performed at least once every four-years unless revoked or suspended due to subsequent findings of imminent hazard or a pattern of knowing or willful non-compliance. PHMSA addresses this concern, in large part, by announcing that it considers only fitness data since the last review. While this is a step in the right direction, applicants may submit several applications at the same or proximate time. It seems a waste of resources to ramp up separate fitness reviews for the same day or even month. We would recommend some de minimis exception between applications. Otherwise, the review becomes just a paper exercise and the cost may not be justified. Keep in mind that a de minimis exception does not preclude PHMSA from suspending or revoking a permit or approval whenever additional proof of non-compliance comes to light.

PHMSA disagrees. As stated earlier in this preamble, when PHMSA receives multiple applications from one entity within a short period of time, PHMSA consolidates these applications when performing its safety review. PHMSA has a five-year plan for reviewing cylinders but a one-year plan for reviewing explosives because we have developed our program to be responsive to the level of risks associated with these materials. However, PHMSA does not

have the resources to commit to reviewing special permit and approval applicants every four years. PHMSA increases the frequency of its inspections involving materials with greater incident risks regardless of the type of applicant.

On-Site Reviews for Fitness Determinations

In its comments, the IME recommended that:

The onsite reviews of fitness be reserved to a small set of applicants that have a history of serious hazmat incidents. However, PHMSA believes that these reviews should be a standard part of the process since onsite reviews are necessary to support the “accuracy” of the determination. This statement appears to conflict the fitness triggers that suggest only applicants exceeding certain performance thresholds would be subject to an onsite inspection. Additional agency justifications for onsite reviews – specifically whether packagings and/or operations requested are safe or what additional operational controls or limitations may be needed – may be relevant to the technical evaluation, but not to the determination of fitness. Finally, we agree that an onsite visit may be used to clear up misunderstandings or inaccuracies. However, the option to conduct an onsite review in these instances should be in response to a request from the applicant. Onsite reviews are no doubt the most costly aspect of the fitness determination process. As noted, some applicants may file multiple applications in a short timeframe. We continue to believe that onsite reviews should only be triggered when fitness cannot be demonstrated by some other means.

PHMSA disagrees that on-site reviews would be required for all applicants. PHMSA plans to conduct on-site reviews for only a small percentage of companies that are determined to have failed a safety profile review. However, an on-site review is not required to make a determination of “unfit.” Since 2010, PHMSA performed on-site reviews of five or fewer companies and none were determined to be unfit. PHMSA agrees that on-site reviews and accompanying close-out consultations are opportunities to clear up misunderstandings and inaccuracies.

Data Accuracy

In response to a solicitation by PHMSA to comment on data accuracy, the IME comments that:

PHMSA asked for comment about how to improve the quality of the Hazmat Intelligence Portal (HIP) data it uses to determine applicant fitness. When PHMSA launched HIP, the regulated community was promised future access to their own information. This has never happened. The best way to ensure data accuracy is to give the regulated community access to their data and an opportunity to challenge and correct misinformation. FMCSA allows motor carriers access to their records and provides a process to correct errors under its CSA program. While FMCSA is still grappling to perfect its process to correct errors, the CSA program sets a precedent that PHMSA should follow.

The vast majority of information PHMSA uses to conduct its carrier-specific fitness reviews, but not general hazardous material reviews, is contained in FMCSA's databases. PHMSA contacted other modal agencies to obtain similar incident data but these agencies either did not have the information needed or were not willing to make this information available to PHMSA. FMCSA's databases are well organized and the agency is willing to share them with PHMSA. PHMSA understands that FMCSA is revising its databases and considering ways to make this information more available to the public. When PHMSA first developed its Hazardous Materials Information System (HMIS) and Hazmat Intelligence Portal (HIP) databases, its intent was to make this information available to the general public. However, PHMSA was unable to complete this step due to budget and software design considerations. PHMSA intends to revise the HMIS, HIP, or other prospective application processing technology, to make the information it contains available to the public in the future.

Fitness Standards

The IME addressed fitness standards in its comments as follows:

The standards by which PHMSA determines “fitness” have profound implications for applicants. PHMSA still proposes a three-tiered review process. PHMSA explains that the applicant is first screened to see if a SPR [safety profile review] is triggered. Second, if a SPR finds any of a second set of risk indicators, an onsite review is triggered. Third, PHMSA’s field operations staff (FOS) will submit a fitness memorandum with a recommendation of fit or unfit. However, this process continues to be seriously flawed:

- **Incident Triggers:** PHMSA states that it is removing low-level incident data from its tier 1 automated fitness determination process, and focusing on three incident categories to trigger a SPR – incidents resulting in death, incidents resulting in injury, and “high-consequence” incidents. However, there are no definitions of “injury” or “high-consequence.” First, we would urge PHMSA to adopt the same definition it uses for a “major injury” – one that requires a hospitalization – when reporting hazardous materials incidents as the definition of “injury” under the fitness standard. Second, PHMSA also needs to define “high-consequence” incident, and that definition must filter what incidents will trigger a tier 3 onsite review under the “Table 1” and “bulk packaging” tier 1 automatic screen. These tier 1 screens require that two or more incidents involve a Table 1 applicant or, in the case of a bulk packaging applicant, three or more incidents, in order to trigger a tier 2 SPR referral. During the SPR, PHMSA states that incidents not attributed to the applicant are dropped. However, we disagree with PHMSA’s policy that “any” of these attributable Table 1 or bulk package incidents would then trigger a tier 3 onsite review regardless of outcome. Just because the incident involved these materials or equipment does not ipso facto mean that the result of the incident was “high-consequence.” Such an interpretation would negate PHMSA’s promise that it is removing “low-level incident data” from the fitness determination. (Also see comments on review triggers below.) We do agree with PHMSA that an incident resulting in a death or injury (requiring hospitalization) attributable to the applicant (other than driver error) is an appropriate standard to trigger a tier 3 review. Finally, an incident attributable to a “package” may be relevant for a technical evaluation, but it is unclear why such an incident would be relevant to the fitness determination.
- **Conflicting Tier 1 Triggers:** Despite the statement above that only three types of high consequence incidents would trigger a fitness review, PHMSA states that a “pattern of minor violations may reveal larger problems that could adversely affect transportation safety.” Again, this statement appears to negate PHMSA’s statements about what standards may result in a determination of “unfit.”
- **Conflicting Tier 2 Triggers:** In the preamble, PHMSA states that it has revised its SOP to base fitness evaluations (and SPRs) on incidents and/or violations revealing “flagrant patterns and serious violations.” (Emphasis PHMSA’s.) Later in the preamble, PHMSA states that “the suggestion to ignore minor leaks in packaging may not be inconsequential depending on the risks contained in the material, and, therefore, [PHMSA] may not eliminate this as a consideration in a fitness evaluation.” The preamble also states that a trigger for a tier 2 SPR is “two or more prior enforcement case referrals.” However, PHMSA’s proposed “Appendix A” states that the trigger is met if the applicant has “a

[i.e., one] prior enforcement case referral.” These conflicting statements confuse rather than clarify agency policy and practice. PHMSA needs to clarify these discrepancies.

- Tier 3 standard/What is “Fit”? Most concerning about PHMSA’s notice is that applicants unlucky enough to find themselves with a tier 3 onsite review still do not know what will be examined in an onsite inspection or what standard of performance will yield a finding of “fitness.” PHMSA states that, during the inspection, “investigators” will search “for evidence that an applicant is at risk of being unable to comply with the terms of [any applicable] special permit, approval, or ... HMR.” In fact, PHMSA states that the FOS may initiate audits of the applicant’s operations when determining fitness. PHMSA should provide examples of “evidence” that would put an applicant at risk, and clarify what records will have to be produced, who onsite can expect to be interviewed, and how long an onsite review can be expected to take. The onsite inspection should conclude with a closing conference outlining options applicants will have to learn of and address any identified concerns. We assume an inspection report will be prepared. Please clarify whether the applicant will receive a copy. Without some limitations, these inspections could degenerate into fishing expeditions. The uncertainty of what level of performance would produce a finding of “fit” is a burden that will only be borne by U.S. businesses.
- Judge and Jury: FOS have been delegated responsibility for the fitness review process for all decision-making after the initial automated review. Although PHMSA proposes that the associate administrator will “review” all special permit and approval applications, the permit or approval can be issued by individuals other than the associate administrator. We are concerned that too much authority for the fitness review, inspection, and determination is left in the hands of one individual. If the associate administrator has delegated the final decision on a fitness determination to FOS, at minimum, FOS should have to get the SPAP to sign-off on the decision.

The information PHMSA uses for safety profile reviews acquired from the incident report forms is standardized. High-consequence/injury events are similar to requirements which trigger National Response Center reporting under § 171.15. Incident reports may also be caused by incorrect package assembly or improper maintenance. Fitness coordinators will consult this information in addition to that provided in an application and, if clarifying information is needed, will contact the applicant to obtain it. If the information the applicant provides is sufficient, an on-site inspection may not be necessary. Also, participation from PHMSA’s Engineering and Research Division may be required. PHMSA will conduct an on-site review if it has evidence that: 1) an applicant is at risk of being unable to comply with the terms of an application; 2) any

incident listed under paragraph 3(b)(i)(1) of the Appendix A to Part 107 is attributable to the applicant or package, other than driver error; 3) during an inspection in the four years prior to submitting the application an applicant has not implemented sufficient corrective actions for prior violations, or is at risk of being unable to comply with the terms of an application for or an existing special permit, approval, or the HMR; or 4) incorrect or missing markings, labels, placards or shipping papers. The safety profile evaluation will normally follow the same procedures as an inspection. As stated earlier, the FOPS officer or OA representative will provide an exit briefing to document any observed violations, including those which may affect fitness determinations. After PHMSA's Field Operations Division staff, or a representative of the Department, completes the safety profile evaluation the FOPS staff person or OA representative will make a recommendation to PHMSA's Approvals and Permits Division if a company is fit or unfit. PHMSA's Approvals and Permits Division will make the final fitness determination. Denied applicants have a right to reconsideration and appeal of that decision as prescribed in §§ 107.123, 107.125, 107.715, and 107.717. Further, PHMSA must include the scope of its inspection responsibilities under the HMR in the safety profile reviews it conducts.

Presumption of Guilt

In its comments, IME stated that:

PHMSA states that the process it has implemented "does not presume innocence or guilt" of an applicant. However, "new companies with no performance history" will still be subject to a fitness determination. PHMSA's treatment of new companies is one that presumes non-compliance. These reviews will be based on a new company's "training records." Training records are only available for review onsite. Consequently, new companies will automatically find themselves pushed to a tier 3 inspection. We disagree that new companies automatically warrant this costly level of review. Additionally, PHMSA states that "select holders" who have never been inspected will be automatically referred for a tier 2 SPR. Again, this criterion is based on a presumption of non-compliance. This fact alone should not be a justification for a fitness review.

PHMSA agrees that an applicant's history should not imply a presumption of guilt and there is no need to require on-site review of hazmat matters with lower risk, such as training records. PHMSA does not believe that an applicant's lack of data is correlated to non-compliance. New companies are automatically presumed to pass their safety review since they have no "triggers" in the system. However, the fact that a company is new does not prevent PHMSA from doing inspections under other sections of the HMR.

Modal Evaluation

Regarding the evaluation performed by various modes during a fitness determination, IME commented that:

PHMSA states that it coordinates application evaluation with DOT modal agencies when the application is "mode specific, precedent setting, or meet[s] federal criteria for a "significant economic impact". We question the rationale for involving a modal agency in any application that does not involve the mode irrespective of whether it is precedent setting, or of significant economic impact. Furthermore, all modes have their own standards for determining "fitness." PHMSA should not allow modal agencies to use PHMSA's fitness procedures to impose more stringent fitness requirements than already exist in their modal regulations. Likewise, PHMSA should not use the fitness assessment process to impose its interpretation of who is a fit carrier on the modal agencies. We believe that the data reviewed should be relevant to the application. If an application involves "shipper" activities, "carrier" incidents attributable to the applicant, for example, should not be considered in the fitness determination. Likewise, modal agencies should not be involved in classification approvals. For example, applications for explosives classifications are based on UN tests performed by PHMSA-approved laboratories. There is no modal nexus to classification approvals.

The DOT's modal agencies currently evaluate only those issues that are germane to their mode of transportation according to their own established criteria, and this will continue. In most cases, modal agencies will not be involved in the evaluation of classification approvals. However, the modal agencies may make fitness recommendations with on-site reviews of an applicant according to their own established criteria.

Guidance

In its comments, IME expressed concern whether the Appendix proposed in the NPRM was considered by PHMSA as a regulation when it stated that:

PHMSA states that rulemaking is not required because it considers these criteria to be “internal” guidance for its staff. Acting on this declaration, PHMSA proposes to incorporate its SOPs and fitness criteria into the HMR only as an “appendix.” This nomenclature and justification are troubling. Congress certainly felt that the SPAP SOPs and fitness criteria warrant the status of a rule, directing that “regulations” be issued by a date certain. Moreover, to be crystal clear in its intent, Congress directed that these rules be issued under the Administrative Procedure Act. PHMSA’s declaration that this appendix is simply guidance begs the question of how the agency views the legal status of the document. As “guidance”, does PHMSA believe that the appendix can be changed, after this initial “rulemaking”, at will, as the agency has done to the current SOPs? We ask PHMSA to resist any temptation to treat the appendix as anything less than a regulation and to clarify the legal standing of the “appendix” in the final rule. Agency guidance issued without the benefit of careful consideration under the procedures for regulatory development and review risks being arbitrary and capricious.

PHMSA disagrees. The Appendix prescribed in this final rule is regulatory text that also performs as guidance because it discloses PHMSA’s administrative processes to the regulated public. To change the language in this appendix, PHMSA must issue a rulemaking. Another example of an appendix in the HMR that sets forth guidance is the “List of Frequently Cited Violations” in Appendix A of 49 CFR Part 107, Subpart D. Both inform the regulated public of general guidelines PHMSA uses to make determinations.

Reconsideration/Appeals

The IME noted that in the NPRM PHMSA proposed to process requests for reconsideration and appeals of special permit and approval decisions “in the same manner ... [as] new applications.” It asked “what is the point of making such a filing if the application will

simply be treated as a new application?” In addition, IME stated that “requests for reconsideration and appeals should be handled on a separate track from new applications.”

PHMSA agrees that applications for reconsideration and appeals will be treated differently from regular special permit and approval applications. Reconsideration requests are managed within the Special Permit and Approvals Division in conformance with § 107.123 for special permits and § 107.715 for approvals, and appeals are managed outside of the Special Permits and Approvals Division by PHMSA’s Office of Chief Counsel. When an applicant requests reconsideration of a denied application, the request is provided a higher priority in the review process. Thus, a decision will tend to be rendered more quickly since the initial review and evaluation has been completed. Appeals are handled by the Office of the Administrator and are not part of the routine special permit and approval evaluation process.

Transparency and Accountability

In its comments, IME noted that PHMSA describes its statutory obligation to publish notice of the receipt of special permit applications in the Federal Register. It also noted that, on its own initiative, PHMSA also occasionally publishes final actions taken on special permit applications. The IME recommended that PHMSA utilize this rulemaking to institutionalize the publication of final decisions on applications for special permits in the Federal Register.

PHMSA is required by law to publish receipt and processing of its special permit applications in the Federal Register. This is an ongoing activity and cannot be addressed by issuing these decisions once in this final rule.

Organizational Issues

IME noted that:

PHMSA enumerates six screening criteria used during the tier 1 automated fitness review. Screens 5 and 6 should be listed as standalone provisions. In contrast to screens 1 through 4, the criteria in screens 5 and 6 are not derived from the occurrence of a high-consequence event or an enforcement action. Rather, they are descriptions of when and how the automatic review will be conducted for particular applicants.

Additionally, we question the inclusion of screen 6 in this section of the rule in light of a correction notice recently issued by PHMSA which clarifies that only those applicants who do not require coordination with an Operating Administration (OA) would be subject to the tier 1 review. Yet, screen 6 describes the review that applicants who are interstate carriers would undergo which is based on criteria of FMCSA, an OA. It seems intuitive that PHMSA would “coordinate” with FMCSA for the data used in this review.

PHMSA agrees with the IME and will revise the language in the Appendix of this final rule to make this correction. Further, the trigger selection process is an automated review and done without FMCSA interaction.

Interim Process

IME comments that Congress directed PHMSA to issue the regulations contemplated by this rulemaking no later than September 30, 2014. However, the comment period for the NPRM did not close until October 14, 2014, and the statutory deadline will obviously be missed. In light of these developments, IME expresses concern about the SOPs and fitness criteria that PHMSA will continue to use before the rule is promulgated. The IME expresses the hope that PHMSA will make changes to current practices and standards, but in the interim, exercise restraint in how it carries out any punitive actions using unauthorized procedures and criteria.

PHMSA has undergone its best effort to meet the deadline mandated for this rulemaking by the Congress in MAP-21. The provisions the commenter is requesting will become effective through the issuance of this final rule. PHMSA does not plan to implement interim SOPs or

fitness criteria or make changes to its current practices and standards before the ones prescribed in this final rule are implemented. Therefore, PHMSA has addressed the commenter's concerns.

Miscellaneous

In its closing comments, the IME makes several recommendations:

(1) PHMSA may wish to clarify the following statements:

- A. Further, the HMR permit, in various sections, some federal agencies limited authority to directly issue certain types of approvals because of the proven safety of the type of action and/or process requested in the approval, and the subject matter expertise each agency can provide regarding hazardous materials transportation.
- B. During the evaluation phase, if the tasks or procedures requested in each special permit or approval application are determined to provide an equivalent level of safety to that required in the HMR or, if a required safety level does not exist, that they provide a level of safety that demonstrates an alternative consistent with the public interest that will adequately protect against the risks to life and property inherent in the transportation of hazardous materials.

(2) PHMSA's proposed definition of "applicant fitness" at § 107.1 is incorrect based on the preamble statement. Rather than "... a determination by PHMSA ...", the text should read "... a determination by the Associate Administrator ...".

PHMSA agrees with the IME and has made these clarifications and corrections.

E. Reusable Industrial Packaging Association

Data Used for Fitness Determination

The Reusable Industrial Packaging Association (RIPA) supports PHMSA's stated intention in the NPRM to remove "low-level" incident data from fitness determinations, focusing rather on high-level incidents involving death, injury, or other "high-consequence" cases. RIPA does not believe an isolated incident or a reported packaging leak, with no other attendant consequences, warrants a rejection of fitness. RIPA also supports PHMSA's proposal to limit the

historical period to 4 years over which the agency will review an applicant's performance history, citing it as "practical and more than sufficient to ensure safety." RIPA requested that PHMSA "... avoid linking a rejection or denial of an application to a single metric or a single occurrence in an applicant's history." PHMSA has revised the guidance document to emphasize high-level incidents, but disagrees that it must not consider an isolated incident or package leak depending on how seriously the incident affects safety. If a single incident leads to death, serious injury, or a high-consequence event, rejection of that application would be appropriate and satisfy PHMSA's mission.

Delays in Processing Approval Applications

RIPA stated "PHMSA should address how its proposed modifications to the approval procedures will affect the increasing delays in processing approval applications. According to data recently supplied by the agency, as of October 6, 2014, there were 783 approval applications that had been in process for more than 120 days without a decision. As of July 7, 2014, there were only 570 approval applications older than 120 days. In just three months, the number of applications beyond the 120-day threshold has grown over 37 percent." One of the purposes of PHMSA's SOPs is to aid the agency in decreasing its delays in processing special permit and approval applications by ensuring that PHMSA begins its review with as complete an application as possible.

PHMSA disagrees. As stated earlier in this preamble, PHMSA is not restricted to a 120-day deadline. PHMSA has a responsibility to authorize only those activities deemed safe in transportation and must not institute practices that would ignore this responsibility. Each

application can be unique and require different types of complex information to complete its review, and PHMSA continues to work to improve processing times.

Approval Technical Template

RIPA is concerned the additional levels of scrutiny for approval applicants in the proposed SOPs will add to PHMSA's delays in processing applications. RIPA also stated it asked in prior comments to the agency (February 29, 2012; Paul W. Rankin to Docket No. PHMSA-2011-0283--see <http://www.regulations.gov/#!documentDetail;D=PHMSA-2011-0283-0003>) how PHMSA can ask an applicant to "demonstrate its readiness to meet the terms of an approval if, in fact, the large investment required cannot be made without some certainty of being approved. PHMSA should articulate a process to encourage the adoption of new and better technologies without the huge uncertainty that the application process currently presents." RIPA suggested PHMSA implement an "approval technical template ... as a guideline for applicants seeking the same (or very similar) approval. Such a template might also help applicants understand better the threshold for a 'complete' application." RIPA believes that "PHMSA's plans to codify into the HMR certain approvals with wide applicability and records of safety could also go a long way in disseminating new technologies and safe practices."

PHMSA agrees with RIPA that some types of approvals require less scrutiny than others and, thus, take less time to review. PHMSA also agrees that creating templates to help applicants meet SOPs targets would aid the applicants with successfully completing their applications. However, all forms and other types of government requests from the public must first be developed and cleared through the Office of Management and Budget. PHMSA has not

developed a template under this rulemaking, and, as a result, this activity is outside the scope of this rulemaking. Therefore, PHMSA must decline this request.

Insufficient Corrective Actions

RIPA found that PHMSA's proposed criteria for "insufficient corrective actions":

...taken following two or more prior enforcement cases is a standard so broad as to be nearly meaningless. If corrective actions were insufficient, isn't the applicant still out of compliance? Also, who makes a determination of "insufficient corrective action"? Is there a document trail to follow in making such a determination? What if those cases were several years in the past, and were administered by wholly different personnel? Does the proposed 4-year historic limit apply here?

PHMSA agrees with RIPA that it should add more clarity regarding the term "insufficient corrective action." This will aid applicants as well as those conducting reviews to determine whether an applicant meets these criteria. Additionally, this will greatly aid the review and processing of applications, and clarify to applicants when a corrective action is satisfactory under the HMR. Therefore, PHMSA has added this definition to § 107.1.

On-Site Inspections

RIPA believes on-site reviews should be limited to the most serious instances of safety concerns. However, it states that the criteria for "fit or unfit" remain somewhat malleable, and could support the rejection of an application based on a FOPS Division agent recommendations that may be far removed from the narrow special permit or approval being sought. RIPA requests that an on-site review of an applicant for an approval need not be a "curb-to-curb" inspection, but a limited review of the operation or packaging in question, and that inspectors should take action only on compliance issues "in plain sight." RIPA states in its experience, this threshold provides equivalency in terms of public safety.

As stated earlier in this final rule, an applicant that has not implemented sufficient corrective actions for prior violations, or is at risk of being unable to comply with the terms of an application for a special permit or approval, an existing special permit or approval, or the HMR, must be evaluated by PHMSA to determine that the applicant is unfit to conduct the activities requested. A full inspection is necessary for a complete assessment of the company's capabilities.

F. Sporting Arms and Ammunition Manufacturers' Institute, Inc.

The Sporting Arms and Ammunition Manufacturers' Institute, Inc., (SAAMI) expresses appreciation of PHMSA's efforts to engage in a rulemaking process regarding the procedures for special permits and approvals applications to allow review and comment by stakeholders. It stated that such a rulemaking addresses concerns with non-transparency when internal policies are enforced but not published. In addition, SAAMI supported the proposed fitness review period of four years, classification approvals not requiring a fitness review, and subjecting applicants for party-to status on a special permit to the same fitness standards as the original applicant. However, SAAMI also expressed concerns "that inflexible and non-accountable internal policies do result in routine unjustified delays for industry operating in good faith," and provided the following recommendations.

MAP-21 Requirements

In its comments, SAAMI states the SOPs as guidance will not provide "the accountability sought by industry and regulated by Congress" under Congress' MAP-21 instruction to PHMSA to issue this guidance. PHMSA disagrees. Congress directed PHMSA to issue regulations and

objective criteria that support the administration and evaluation of special permit and approval applications. This final rule accomplishes that directive.

SAAMI references PHMSA remarks in the NPRM that the Appendix A is a guidance document to be used by PHMSA for the internal management of its special permits and approvals program. In addition, SAAMI questions the scope of the rule, stating its view that the proposed criteria cover fitness checks, but not other aspects of the evaluation of applications, and also believes that the Appendix A to 49 CFR Part 107 is not guidance, but rather is regulation. 49 CFR Part 107, Appendix A, is regulatory text because it is being published in the HMR. It also serves as agency guidance in that it discloses PHMSA's administrative processes to the regulated public. Similarly, Appendix A of 49 CFR Part 107, Subpart D, sets forth guidance in the HMR for frequently cited violations. Both appendices inform the regulated public of general guidelines PHMSA uses to make determinations.

Length of Time to Process Approvals

SAAMI states its awareness that classification approvals are taking "far too long to be issued." Specifically, SAAMI states the 120-day timeline PHMSA currently uses "is twice or more the typical time used by other governments to issue similar approvals. This now has been increased to 180 days in notices sent to applicants. Industry can't function efficiently when their new product introductions are delayed." However, SAAMI supports PHMSA delegating these responsibilities to certified third parties, because it states "the number of PHMSA staff working on these approvals" and "the small technical team responsible for 20,000 approvals per year" is inadequate to quickly perform these tasks, especially when diverted by other work responsibilities like evaluating issues concerning crude oil by rail or other technical questions.

As stated earlier in this preamble, PHMSA is not required to issue special permits and approvals in 120 days, but instead must issue them when the agency has determined that the actions requested in the application are safe. Further, PHMSA is streamlining its internal and online practices for processing special permit and approval applications, and will strive to improve these processing times in the future, especially with regard to explosives and fireworks.

Routine Revisions

SAAMI states that for non-significant “routine revisions to special permits and approvals, such as a company changing its name or acquiring another company...[PHMSA] has been inflexible in the application of its internal, non-regulatory requirements for complete documentation of test result, packaging and so forth when there has been no change to the operations at the facility.” Noting that “some companies have hundreds or over a thousand classification approvals,” SAAMI states that these approvals should not be required to meet the new completeness criteria and “undergo a technical review with a complete data package as is currently the case.” SAAMI recommends instead that these approvals be “processed in batches as an administrative function.” SAAMI further recommends that requests for tweaks to recently modified approvals “...not go to the bottom of the stack with an additional 180-day waiting period,” as is also currently required, and that PHMSA resolve its recordkeeping problems “rather than making companies resubmit complete data packages” as described in the NPRM preamble. As stated earlier in this preamble, PHMSA currently does not have the resources to institute a separate processing method for routine and editorial revisions but will consider changes of this type as resources become available.

Timelines

SAAMI notes that special permits have determination timelines in § 107.113(a) but that approvals do not have similar provisions in § 107.709, and recommends that these sections be aligned. Similarly, SAAMI recommends that the deadline that exists in § 107.709 that requires applicants to respond to PHMSA's requests within 30 days also be applied to special permit applicants in § 107.113. SAAMI also recommends that PHMSA consider adding timelines to its responses to requests for reconsideration and appeals, which currently apply only to stakeholders. PHMSA disagrees. As stated earlier in this preamble, PHMSA is not subject to the timelines in the HMR prescribed for applicants to submit special permit and approval applications for processing and renewal. PHMSA must ensure the activities requested in these applications are safe before approving these requests.

Fitness Procedures

SAAMI's comments regarding fitness procedures indicated that PHMSA should focus on the most serious safety concerns and believe that some of the criteria PHMSA proposes to use to evaluate an applicant's fitness are not adequate to make this assessment. PHMSA agrees and has made these changes.

SAAMI noted that of the six criteria listed in proposed Appendix A paragraph (3)(i), two refer to "incidents." SAAMI recommends PHMSA define "incidents" "to ensure that only serious incidents will be factored in." PHMSA declines this request. "Incident" is already defined in § 107.1 as "...an event resulting in the unintended and unanticipated release of a hazardous material or an event meeting incident reporting requirements in §§ 171.15 or 171.16 of this chapter."

SAAMI noted that although the criterion for insufficient corrective action relevant to a prior enforcement case is defined, the definition merely states that the fitness officer has made a determination. SAAMI recommends that this determination be quantified and the subsequent criteria be published in a rulemaking for transparency, due to the serious impact of application rejection. PHMSA disagrees. Special permit and approval applications are reviewed on a case-by-case basis because they are often unique and sometimes include information subject to applicant confidentiality requests. PHMSA believes providing specific determinations and corrective actions directly to an applicant is the most effective way to convey the compliance information where it is needed. Also, as stated earlier, PHMSA has revised this final rule to establish two, instead of four, triggers of violations for each applicant for a safety profile review or five or more triggers for an on-site inspection enforcement case referral event. Either will result in a failed automatic safety profile evaluation recommendation. Fitness Coordinators will follow-up with the applicant to provide and obtain clarifying information.

SAAMI recommends that to reduce subjectivity in safety profile and on-site fitness reviews, PHMSA document the criteria used to make these determinations. SAAMI also suggests that minor violations of the HMR that do not seriously impact safety not be factored in a fitness review. To address this issue, SAAMI further recommends that PHMSA “create a threshold below which violations are not factored in the review, or if a pattern of minor violations are taken into [e]ffect,” PHMSA should create a metric to determine what is a pattern and provide an opportunity for public comment. PHMSA disagrees. For the two trigger violation thresholds, only enforcement cases are factored in. Enforcement cases only pertain to serious safety violations.

Finally, SAAMI states “there is too much subjectivity inherent in the proposed authority to be given to the PHMSA Field Operations Officer or authorizing Operating Administration representative.” SAAMI requests that violations be given an administrative second check to verify that they exist and that PHMSA should provide recourse to a company to challenge such findings without their having to resubmit a data package. SAAMI recommends that for applicants with multiple or frequent applications, “fitness reviews[,] including on-site reviews[,] should not be conducted until after a certain time has elapsed since the last review.” Without such limits, SAAMI states, “the review becomes just a paper exercise using scarce resources of the agency.” PHMSA disagrees. As stated earlier, the fitness coordinator will contact the applicant for clarifying information that may eliminate the need for an on-site inspection. Violations in case reports are given second reviews by a first-line supervisor in the field and then by PHMSA legal counsel. Subsequent reviews are only completed up to the time of the last review to determine if something serious happened since the last review.

Closing Recommendations

SAAMI closes out its comments by providing a list of recommendations. They are as follows:

SAAMI recommends that PHMSA align the description of the type of approvals with those listed for special permits by adding classification, non-classification and registration approvals, noting that the NPRM “lists all types of special permits but only agency designation approvals. Classification, non-classification and registration approvals are not listed.” PHMSA disagrees. The Appendix in this final rule provides this exact information in the table “Special Permit and Approval Evaluation Review Process.”

SAAMI requests that PHMSA clarify in Appendix paragraph (3)(b)(ii) who will perform the fitness check when more than one OA is involved to streamline the process and clarify that PHMSA's performance of a fitness review is not an additional [seventh] fitness review criterion. SAAMI recommends that PHMSA perform the fitness review if more than one OA is involved using this language: "The applicable OA performs a profile review if one mode of transportation is requested in the application[;] however, PHMSA [will perform] the review if two or more modes of transportation are included." PHMSA agrees that we do, and would oversee and not perform a safety profile evaluation if more than one mode is needed.

SAAMI requests that PHMSA clarify that OA's will not be permitted "to use fitness procedures to impose more stringent fitness requirements than already exist in the OA's regulations." While PHMSA agrees that this clarification would be useful, this action is beyond the scope of this rulemaking because it is dictated by each OA's internal process documents. All special permit and approvals subject to OA coordination will be subject to OA criteria for fitness and not all of the OA criteria are regulatory. For example, air carrier fitness will be based upon whether or not the air carrier has "will-carry" status and is fit to fly. Therefore, FAA cannot in good conscience say an air carrier is fit to perform the activities prescribed in a special permit when the carrier has been assessed as not fit to fly. Therefore, PHMSA denies this request.

SAAMI points out that in Appendix A (3)(b)(iii), the reference to (3)(b) refers to itself, and suggested revising the reference to (3)(b)(i) and (3)(b)(ii). PHMSA agrees and has made this correction.

SAAMI requests that the language in Appendix paragraph (4)(a) and (4)(b) be revised to clarify that special permit and approval applications are not issued. PHMSA agrees and has made this correction.

IV. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This final rule is published under the authority of 49 U.S.C. 5103(b), which authorizes the Secretary to prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce. 49 U.S.C. 5117(a) authorizes the Secretary of Transportation to issue a special permit from a regulation prescribed in sections 5103(b), 5104, 5110, or 5112 of the Federal Hazardous Materials Transportation Law to a person transporting, or causing to be transported, hazardous material in a way that achieves a safety level at least equal to the safety level required under the law, or is consistent with the public interest, if a required safety level does not exist. This final rule is also established under the authority of section 33012(a) of MAP-21 (Public Law 112-141, July 6, 2012). Section 33012(a) requires that no later than July 6, 2014, the Secretary of Transportation issue a rulemaking to provide notice and an opportunity for public comment on proposed regulations that establish standard operating procedures (SOPs) to support administration of the special permit and approval programs, and objective criteria to support the evaluation of special permit and approval applications. In this final rule, PHMSA is addressing the provisions in the Act.

B. Executive Order 12866, 13563, and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under § 3(f) of Executive Order 12866 and was not reviewed by the Office of Management and Budget (OMB). The final rule is not considered a significant rule under the Regulatory Policies and Procedures order issued by the Department of Transportation [44 FR 11034].

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) require agencies to regulate in the “most cost-effective manner,” to make a “reasoned determination that the benefits of the intended regulation justify its costs,” and to develop regulations that “impose the least burden on society.” Executive Order 13563 supplements and reaffirms the principles governing regulatory review that were established in Executive Order 12866, Regulatory Planning and Review of September 30, 1993. Additionally, Executive Orders 12866, and 13563 require agencies to provide a meaningful opportunity for public participation. Accordingly, PHMSA invited public comment on these considerations at a public meeting held on February 29, 2012 (see Docket No. PHMSA-2011-0283), and in the NPRMs issued on August 12, 2014, and September 12, 2014, under Docket No. PHMSA-2012-0260. PHMSA requested that the public include in its comments any cost or benefit figures or factors, alternative approaches, and relevant scientific, technical and economic data. These comments aided PHMSA in the evaluation of the proposed requirements. PHMSA has since revised our evaluation and analysis to address the public comments received.

In this final rule, PHMSA amends the HMR to incorporate SOPs for processing and issuing special permit and approval applications. Incorporating these provisions into regulations of general applicability will provide shippers and carriers with clarity and flexibility to comply with PHMSA’s initial review and, as needed, subsequent renewal or modification process. In addition, the final rule would reduce the paperwork burden on industry and this agency from delays in processing incomplete applications. Taken together, the provisions of this final rule would improve the efficacy of the special permit and approval application and issuance process, which will promote the continued safe transportation of hazardous materials, while reducing transportation costs for the industry and administrative costs for the agency.

While the majority of commenters did not suggest this rulemaking would impose any cost to the regulated community, IME did note costs and benefits change when the procedures and standards change. PHMSA agrees that changes to procedures could impact both cost and benefits, but we reiterate this rulemaking does not change current practices; rather, it simply codifies current operating procedures of the Approval and Permits Division. Therefore, PHMSA does not anticipate increased cost and the impact of this final rule is presumed to be minor. It intends to provide clarity by reducing applicant confusion regarding the special permit and approval application and renewal process, and improve the quality of information and completeness of the application submitted. Although it is difficult to quantify the savings, many special permits and approvals have economically impacted companies by improving the efficiency and safety of their operations in a manner that meets or exceeds the requirements prescribed in the HMR. Some examples of positive economic impacts include allowing the use of less expensive non-specification packages, reducing the number of tasks, or other methods that reduce costs incurred before the approval or special permit is issued. As a result, PHMSA calculates that this final rule does not impose any costs on industry. Although a slight reduction in the costs associated with processing delays may provide nominal benefits, generally, this final rule affects only agency procedures; therefore, we assume no change in current industry costs or benefits.

C. Executive Order 13132

This final rule was analyzed in accordance with the principles and criteria contained in Executive Order 13132 (“Federalism”). This final rule would preempt state, local and Indian tribe requirements but does not propose any regulation that has substantial direct effects on the

states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply. Federal hazardous material transportation law, 49 U.S.C. 5101-5128, contains an express preemption provision (49 U.S.C. 5125(b)) preempting state, local and Indian tribe requirements on certain covered subjects. The covered subjects are:

- (1) The designation, description, and classification of hazardous materials;
- (2) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;
- (3) The preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents, and placement of those documents;
- (4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials; and
- (5) The designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

This final rule addresses covered subject items (1), (2), (3), and (5) and would preempt any State, local, or Indian tribe requirements not meeting the “substantively the same” standard. 49 U.S.C. 5125(b)(2) states that if PHMSA issues a regulation concerning any of the covered subjects, it must determine and publish, in the Federal Register, the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule, and not later than two years after the date of issuance. PHMSA

proposes the effective date of federal preemption will be 90 days from publication of the final rule in this matter in the Federal Register.

D. Executive Order 13175

This final rule was analyzed in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”). Because this final rule does not have tribal implications and does not impose substantial direct compliance costs on Indian tribal governments, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant impact on a substantial number of small entities. Incorporation of these SOPs into regulations of general applicability will provide shippers and carriers with additional flexibility to comply with established safety requirements, thereby reducing transportation costs and increasing productivity. Entities affected by the final rule conceivably include all persons--shippers, carriers, and others--who offer and/or transport in commerce hazardous materials. The specific focus of the final rule is to incorporate standard procedures to assess an applicant’s fitness, i.e., ability, to perform the required tasks to receive the relief from the HMR that each applicant is requesting. Overall, this final rule will reduce the compliance burden on the regulated industries by clarifying PHMSA’s informational requirements for a special permit and

approval application. We expect that the applicant will be better able to provide this information and, as a result, PHMSA can improve application processing and issuance times.

The Institute of Makers of Explosives (IME) stated the majority of its members are small businesses and the following: 1) classification approvals are also the basis for obtaining authorization from foreign competent authorities to transport explosive products abroad, 2) criteria PHMSA uses for determining a company's fitness to carry out the terms of a special permit or approval can have profound implications for the ability of the commercial explosives industry to continue to do business in the United States, 3) differences between past SOPs PHMSA posted on line and the ones approved under this rulemaking may result in costs and benefits not currently assigned to this rulemaking, and 4) backlogs in processing special permit and approval applications adversely affect U.S. competitiveness. However, the IME did not provide any cost information to quantify the possible effects the SOP guidance proposed in the NPRM would have on its industry.

PHMSA's SOPs for special permits and approvals serve as internal administrative guidance to help its staff properly process these applications, reduce delays, and accommodate changes to automated systems, database availability, and DOT and PHMSA directives. PHMSA recognizes the financial impact special permits and approvals have on industry processes. As mentioned earlier in this preamble, risks associated with hazardous materials and the potential for severe consequences to the public and environment, if they are improperly transported, require that PHMSA must not authorize permission to transport these materials in a manner not permitted under the HMR until PHMSA ensures that the actions requested and the persons performing these actions are safe. In response to requests from commenters, including the IME, PHMSA revised the SOPs in this final rule for clarity, and to include activities for applicant

review that are statistically revealed to be greater indicators of their safe performance in transportation. In addition, PHMSA committed to investigate opportunities to improve its special permit and approval application review processes in the future, as these opportunities become available to the agency. Therefore, we certify that this final rule will not have a significant economic impact on a substantial number of small entities.

This final rule has been developed in accordance with Executive Order 13272 (“Proper Consideration of Small Entities in Agency Rulemaking”) and DOT’s procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

F. Paperwork Reduction Act

PHMSA has analyzed this final rule in accordance with the Paperwork Reduction Act of 1995 (PRA). The PRA requires federal agencies to minimize the paperwork burden imposed on the American public by ensuring maximum utility and quality of federal information, ensuring the use of information technology to improve government performance, and improving the federal government’s accountability for managing information collection activities. This final rule’s benefits include reducing applicant confusion about the special permit and approval application and renewal processes; improving the quality of information and completeness of applications submitted; and improving applicant processing times. This final rule does not impose any additional costs on industry. Although a slight reduction in the costs associated with processing delays may provide nominal benefits, generally, this final rule affects only agency procedures; therefore, this final rule contains no new information collection requirements subject

to the PRA. Further, this final rule does not include new reporting or recordkeeping requirements.

As stated earlier in this preamble, PHMSA is not aware of any information collection and recordkeeping burdens for the hazardous materials industry associated with the requirements proposed in this rulemaking. Thus, PHMSA has not prepared an information collection document for this rulemaking and did not assess its potential information collection costs. However, if any regulated entities determine they will incur information and recordkeeping costs as a result of this final rule, if information on this matter should become available, or if commenters have questions concerning information collection on this final rule, PHMSA requests that they provide comments on the possible burden developing, implementing, and maintaining records and information these requirements may impose on businesses applying for a special permit or approval. Please direct your comments or questions to Steven Andrews or T. Glenn Foster, Standards and Rulemaking Division, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, Telephone (202) 366-8553.

G. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document may be used to cross-reference this action with the Unified Agenda.

H. Unfunded Mandates Reform Act of 1995

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$141.3 million or more to either state, local or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the proposed rule.

I. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321-4375, requires that federal agencies analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations require federal agencies to conduct an environmental review considering the need for the proposed action, alternatives to the proposed action, probable environmental impacts of the proposed action and alternatives, and the agencies and persons consulted during the consideration process. 40 CFR 1508.9(b).

The Need for the Proposed Action

This final rule revises the HMR to include the standard operating procedures and criteria used to evaluate applications for special permits and approvals. This rulemaking also provides clarity for the applicant as to what conditions need to be satisfied to promote completeness of the applications submitted.

Hazardous materials are capable of affecting human health and the environment if a release were to occur. The need for hazardous materials to support essential services means transportation of highly hazardous materials is unavoidable. These shipments frequently move through densely populated or environmentally sensitive areas where the consequences of an incident could entail loss of life, serious injury, or significant environmental damage.

Atmospheric, aquatic, terrestrial, and vegetal resources (for example, wildlife habitats) could also be affected by a hazardous materials release. The adverse environmental impacts associated with releases of most hazardous materials are short-term impacts that can be greatly reduced or eliminated through prompt clean-up of the incident scene. Improving the process by which the agency assesses the ability of each applicant to perform the tasks issued in a special permit improves the chance that the tasks in each special permit issued will be performed safely. Therefore, we do not anticipate any significant positive or negative impacts on the environment by incorporating these SOPs into the HMR.

Alternatives to the Proposed Action

The purpose and need of this final rule is to establish criteria for evaluating applications for approvals and special permits based on the HMR, including assessing an applicant's ability to operate under the approval or special permit. More information about benefits of this final rule can be found in the preamble to this final rule. The alternatives considered in the analysis include: (1) the proposed action, that is, incorporation of SOPs to evaluate applications for approvals and special permits based on the HMR, including assessing an applicant's ability to operate under the approval or special permit into the HMR; and (2) incorporation of some subset of these proposed requirements (i.e., only some of the proposed requirements or modifications to these requirements in response to comments received to the NPRM) as amendments to the HMR; and (3) the "no action" alternative, meaning that none of the NPRM actions would be incorporated into the HMR.

Analysis of the Alternatives

(1) Incorporate Special Permit and Approval Processing Standard Operating Procedures

We proposed clarifications to certain HMR requirements to include those methods for assessing the ability of new special permit and approval applicants, and those applying for renewals of special permits and approvals, to perform the tasks they have requested for transporting hazardous materials. The process through which special permits and approvals are evaluated requires the applicant to demonstrate that the requested approval, the alternative transportation method, or proposed packaging provides an equivalent level of safety as that for activities and packagings authorized under the HMR. Implicit in this process is that the special permit or approval must provide an equivalent level of environmental protection as that provided in the HMR or demonstrate an alternative consistent with the public interest that will adequately protect against the risks to life and property inherent in the transportation of hazardous materials. Thus, incorporating SOPs to assess the performance capability of special permit and approval applicants should maintain or exceed the existing environmental protections built into the HMR.

(2) Incorporation of Some, But Not All, of the Proposed Requirements or Modifications to These Requirements in Response to Comments Received

The changes proposed in the NPRM were designed to promote clarity and ease of the administration of special permits and approvals during the application review process. Since these changes may make it easier for special permit and approval applicants to successfully apply to PHMSA for authorized variances from the HMR, incorporation of the special permit and approval SOPs into the HMR may result in an increased number of applicants transporting hazardous materials under these types of variances. Because PHMSA will have determined the shipping methods authorized under these new variances to be at least equal to the safety level required under the HMR or, if a required safety level does not exist, consistent with the public interest, PHMSA expects that these additional shipments will not result in associated

environmental impacts. Incorporating only some of these changes will help to obscure the informational requirements of the special permit and approval application process, confuse the regulated public by providing a partial understanding of the information needed to submit a complete special permit or approval application, and possibly further delay application review times. PHMSA does not recommend this alternative.

(3) No Action

If no action is taken, then special permit and approval applicants will continue to be assessed in the same manner as they are today. This will result in no change to the current potential effects to the environment, but will also not provide the applicant with information needed to improve its application processing time within PHMSA. Further, it may negatively impact transportation in commerce by not making innovative and safe transportation alternatives more easily available to the hazmat industry. PHMSA does not recommend this alternative.

Discussion of Environmental Impacts in Response to Comments

PHMSA solicited comments about potential environmental impacts associated with the NPRM from other agencies, stakeholders, and citizens. None of the respondents commented on the potential environmental impacts of this rule.

Conclusion

The provisions of this rule build on current regulatory requirements to enhance the transportation safety of hazardous materials transported by all modes. PHMSA has calculated that this rulemaking will not impact the current risk of release of hazardous materials into the environment. Therefore, PHMSA finds that there are no significant environmental impacts associated with this final rule.

J. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenters provide, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

K. Executive Order 13609 and International Trade Analysis

Under Executive Order 13609, agencies must consider whether the impacts associated with significant variations between domestic and international regulatory approaches are unnecessary, or may impair the ability of American business to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

Similarly, the Trade Agreements Act of 1979 (Pub. L. 96-39), as amended by the Uruguay Round Agreements Act (Pub. L. 103-465), prohibits federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

PHMSA participates in the establishment of international standards in order to protect the safety of the American public, and we have assessed the effects of the final rule to ensure that it does not cause unnecessary obstacles to foreign trade. Accordingly, this final rule is consistent with E.O. 13609 and PHMSA's obligations.

V. Section by Section Review

§ 105.5

In § 105.5, we revise the definitions for “approval” and “special permit” to clarify that an approval and special permit may be issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise prescribed in the HMR.

§ 107.1

In § 107.1, we revise the definitions for “approval” and “special permit” to clarify that an approval and special permit may be issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise prescribed in the HMR. In addition, we amend the HMR for clarity to add new definitions for “applicant fitness,” “fit or fitness,” “fitness coordinator,” “insufficient corrective action,” and “sufficient corrective action.”

§ 107.113

In § 107.113, we revise paragraph (a) to state that the Associate Administrator will review all special permit applications in conformance with standard operating procedures proposed in new 49 CFR Part 107, Appendix A.

§ 107.117

In § 107.117, we revise paragraph (e) to state that the Associate Administrator will review all emergency special permit applications in conformance with standard operating procedures proposed in new 49 CFR Part 107, Appendix A.

§ 107.705

In § 107.705, we revise paragraph (b) for clarity to state that the information the applicant provides in an approval application must be relevant to the approval request.

§ 107.709

In § 107.709, we revise paragraph (b) to state that the Associate Administrator will review all approval applications in conformance with standard operating procedures proposed in new 49 CFR Part 107, Appendix A.

49 CFR Part 107, Appendix A

In 49 CFR Part 107, we amend the HMR to add new Appendix A to incorporate PHMSA's existing standard operating procedures for processing special permits and approval applications. The words "fitness evaluation" and "fitness review" in 3(b)(i) are replaced for clarity with the words "safety profile evaluation" and "safety profile review," respectively. The title and words "safety profile review" in 3(b)(ii) are replaced for clarity with "safety profile evaluation." Further, in response to comments we clarify these procedures by revising them from four to five phases and define them as consisting of: Completeness, Federal Register Publication, Evaluation, Disposition, and Reconsideration.

§ 171.8

In § 171.8, we revise the definitions for “approval” and “special permit” to clarify that an approval and special permit may be issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise prescribed in the HMR. In addition, we add language to the “Automated review” and “Safety profile review” sections of the SOPs to clarify that special permit and approval applications that undergo review by an Operating Administration (OA) will complete this review before they undergo an automated review, and that an OA review, depending on its completeness, may negate the need for the automated review, respectively.

List of Subjects

49 CFR Part 105

Administrative practice and procedure, Hazardous materials transportation, Penalties, Reporting and recordkeeping requirements.

49 CFR Part 107

Administrative practice and procedure, Hazardous materials transportation, Penalties, Reporting and recordkeeping requirements.

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

In consideration of the foregoing, we are amending 49 CFR chapter I as follows:

PART 105-HAZARDOUS MATERIALS PROGRAM DEFINITIONS AND GENERAL PROCEDURES

1. The authority citation for part 105 is revised to read as follows:

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.81 and 1.97.

2. In § 105.5, in paragraph (b), the definitions for “approval” and “special permit” are revised to read as follows:

§ 105.5 Definitions.

* * * * *

Approval means a written authorization, including a competent authority approval, issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise prescribed in the HMR, to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter (49 CFR parts 171 through 180).

* * * * *

Special permit means a document issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise prescribed in the HMR, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapter A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 et seq. (e.g., Federal Motor Carrier Safety routing requirements).

* * * * *

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

3. The authority citation for part 107 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410 section 4 (28 U.S.C. 2461 note); Pub. L. 104–121 sections 212–213; Pub. L. 104–134 section 31001; Pub. L. 112–141 section 33006, 33010; 49 CFR 1.81 and 1.97.

4. In § 107.1:

- a. Add in alphabetical order a definition for “applicant fitness”;
- b. Revise the definition for “approval”;
- c. Add in alphabetical order definitions for “fit or fitness,” “fitness coordinator,” and “insufficient corrective action”;
- d. Revise the definition for “special permit”; and
- e. Add in alphabetical order a definition for “sufficient corrective action”.

The additions and revisions read as follows:

§ 107.1 Definitions.

* * * * *

Applicant fitness means a determination by PHMSA, the Associate Administrator’s designee, or as otherwise prescribed in the HMR, that a special permit or approval applicant is fit to conduct operations requested in the application or an authorized special permit or approval.

* * * * *

Approval means a written authorization, including a competent authority approval, issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise

prescribed in the HMR, to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter (49 CFR parts 171 through 180).

* * * * *

Fit or fitness means demonstrated and documented knowledge and capabilities resulting in the assurance of a level of safety and performance necessary to ensure compliance with the applicable provisions and requirements of subchapter C of this chapter or a special permit or approval issued under subchapter C of this chapter.

Fitness coordinator means the PHMSA Field Operations (FOPS) Division officer or an authorized representative or special agent of DOT upon request, such as an Operating Administration (OA) representative, that conducts reviews regarding an organization's hazardous materials operations, including such areas as accident history, on-site inspection, compliance data, and other safety and transportation records to determine whether a special permit or approval applicant is determined to be fit as prescribed in §§ 107.113(f)(5) and 107.709(d)(5).

* * * * *

Insufficient corrective action means that either a PHMSA Field Operations (FOPS) Division officer or an authorized representative or special agent of DOT upon request, such as an Operating Administration (OA) representative, has determined that evidence of an applicant's corrective action in response to prior to enforcement cases is inadequate or incomplete and the basic safety management controls proposed for the type of hazardous material, packaging, procedures, and/or mode of transportation remain inadequate to prevent recurrence of a violation.

* * * * *

Special permit means a document issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, under the authority of 49

U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapters A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 et seq. (e.g., Federal Motor Carrier Safety routing requirements).

* * * * *

Sufficient corrective action means that either a PHMSA Field Operations officer or an authorized representative or special agent of DOT upon request, such as an Operating Administration (OA) representative, has determined that evidence of an applicant's corrective action in response to prior to enforcement cases is sufficient and the basic safety management controls proposed for the type of hazardous material, packaging, procedures, and/or mode of transportation are inadequate.

* * * * *

5. In § 107.113, paragraph (a) is revised to read as follows:

§ 107.113 Application processing and evaluation.

(a) The Associate Administrator reviews an application for a special permit, modification of a special permit, party to a special permit, or renewal of a special permit in conformance with the standard operating procedures specified in appendix A of this part ("Standard Operating Procedures for Special Permits and Approvals") to determine if it is complete and conforms with the requirements of this subpart. This determination will typically be made within 30 days of receipt of the application for a special permit, modification of a special permit, or party to a special permit, and typically within 15 days of receipt of an application for renewal of a special permit. If an application is determined to be incomplete, the Associate Administrator may reject the application. If that occurs, PHMSA will inform the applicant of the deficiency in writing.

* * * * *

6. In § 107.117, paragraph (e) is revised to read as follows:

§ 107.117 Emergency processing.

* * * * *

(e) Upon receipt of all information necessary to process the application, the receiving Department official transmits to the Associate Administrator, by the most rapidly available means of communication, an evaluation as to whether an emergency exists under § 107.117(a) and, if appropriate, recommendations as to the conditions to be included in the special permit. The Associate Administrator will review an application for emergency processing of a special permit in conformance with the standard operating procedures specified in appendix A of this part (“Standard Operating Procedures for Special Permits and Approvals”) to determine if it is complete and conforms with the requirements of this subpart. If the Associate Administrator determines that an emergency exists under § 107.117(a) and that, with reference to the criteria of § 107.113(f), granting of the application is in the public interest, the Associate Administrator will grant the application subject to such terms as necessary and immediately notify the applicant. If the Associate Administrator determines that an emergency does not exist or that granting of the application is not in the public interest, the applicant will be notified immediately.

* * * * *

7. In § 107.705, paragraph (b) introductory text is revised to read as follows:

§ 107.705 Registrations, reports, and applications for approval.

* * * * *

(b) Description of approval proposal. In addition to the provisions in paragraph (a) for an approval, an application for an approval, or an application for modification or renewal of an approval, the applicant must include the following information that is relevant to the approval application—

* * * * *

8. In § 107.709, paragraph (b) is revised to read as follows:

§ 107.709 Processing of an application for approval, including an application for renewal or modification.

* * * * *

(b) The Associate Administrator will review an application for an approval, modification of an approval, or renewal of an approval in conformance with the standard operating procedures specified in appendix A of this part (“Standard Operating Procedures for Special Permits and Approvals”). At any time during the processing of an application, the Associate Administrator may request additional information from the applicant. If the applicant does not respond to a written request for additional information within 30 days of the date the request was received, the Associate Administrator may deem the application incomplete and deny it. The Associate Administrator may grant a 30-day extension to respond to the written request for additional information if the applicant makes such a request in writing.

* * * * *

9. Add Appendix A to 49 CFR Part 107 to read as follows:

Appendix A to Part 107 – Standard Operating Procedures for Special Permits and Approvals

This appendix sets forth the standard operating procedures (SOPs) for processing an application for a special permit or an approval in conformance with 49 CFR parts 107 and 171 through 180. It is to be used by PHMSA for the internal management of its special permit and approval programs.

The words “special permit” and “approval” are defined in § 107.1. PHMSA receives applications for: 1) designation as an approval or certification agency, 2) a new special permit or approval, renewal or modification of an existing special permit or an existing approval, 3) granting of party status to an existing special permit, and 4) in conformance with § 107.117, emergency processing for a special permit. Depending on the type of application, the SOP review process includes several phases, such as Completeness, Publication, Evaluation, and Disposition.

Special Permit and Approval Evaluation Review Process				
	Special Permit	Non-Classification Approval	Classification Approval	Registration Approval
1. Completeness	X	X	X	X
2. Publication	X			
3. Evaluation				
a. Technical	X	X	X	
b. Safety Profile	X	X		X

4. Disposition				
a. Approval	X	X	X	X
b. Denial	X	X	X	X
c. Reconsideration/Appeal	X	X	X	X

An approval for assessing an applicant's ability to perform a function that does not involve classifying a hazardous material is described as a non-classification approval and certifies that: an approval holder is qualified to requalify, repair, rebuild, and/or manufacture cylinders stipulated in the HMR; an agency is qualified to perform inspections and other functions outlined in an approval and the HMR; an approval holder is providing an equivalent level of safety or safety that is consistent with the public interest in the transportation of hazardous materials outlined in the approval; and a radioactive package design or material classification fully complies with applicable domestic or international regulations. An approval for assessing the hazard class of a material is described as a classification approval and certifies that explosives, fireworks, chemical oxygen generators, self-reactive materials, and organic peroxides have been classed for manufacturing and/or transportation based on requirements stipulated in the HMR. Registration approvals include the issuance of a unique identification number used solely as an identifier or in conjunction with approval holder's name and address, or the issuance of a registration number that is evidence the approval holder is qualified to perform an HMR-authorized function, such as visually requalifying cylinders. This appendix does not include registrations issued under 49 CFR part 107, subpart G.

1. Completeness. PHMSA reviews all special permit and approval applications to determine if they contain all the information required under § 107.105 (for a special permit),

§ 107.117 (for emergency processing) or § 107.402 (for designation as a certification agency) or § 107.705 (for an approval). If PHMSA determines an application does not contain all the information needed to evaluate the safety of the actions requested in the application, the Associate Administrator may reject the application. If the application is rejected, PHMSA will notify the applicant of the deficiencies in writing. An applicant may resubmit a rejected application as a new application, provided the newly submitted application contains the information PHMSA needs to make a determination.

Emergency special permit applications must comply with all the requirements prescribed in § 107.105 for a special permit application, and contain sufficient information to determine that the applicant's request for emergency processing is justified under the conditions prescribed in § 107.117.

2. Publication. When PHMSA determines an application for a new special permit or a request to modify an existing special permit is complete and sufficient, PHMSA publishes a summary of the application in the Federal Register in conformance with § 107.113(b). This provides the public an opportunity to comment on a request for a new or a modification of an existing special permit.

3. Evaluation. The evaluation phase consists of two assessments, which may be done concurrently, a technical evaluation and a safety profile evaluation. When applicable, PHMSA consults and coordinates its evaluation of applications with the following Operating Administrations (OAs) that share enforcement authority under Federal hazardous material transportation law: Federal Aviation Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, and United States Coast Guard. PHMSA also

consults other agencies with hazardous material subject-matter expertise, such as the Nuclear Regulatory Commission and the Department of Energy.

(a) Technical evaluation. A technical evaluation considers whether the proposed special permit or approval will achieve a level of safety at least equal to that required under the HMR or, if a required safety level does not exist, considers whether the proposed special permit is consistent with the public interest in that it will adequately protect against the risks to life and property inherent in the transportation of hazardous material. For a classification approval, the technical evaluation is a determination that the application meets the requirements of the regulations for issuance of the approval. If formal coordination with another OA is included as part of the evaluation phase, that OA is responsible for managing this process within the applicable OA. The OA reviews the application materials and PHMSA's technical evaluation, and may provide their own evaluation, comments and recommendations. The OA may also recommend operational controls or limitations to be incorporated into the special permit or approval to improve its safety.

(b) Safety profile evaluation. Each applicant for a special permit or non-classification approval is subject to a safety profile evaluation to assess if the applicant is fit to conduct the activity authorized by the special permit or approval application. PHMSA will coordinate the safety profile evaluations with the appropriate OA if a proposed activity is specific to a particular mode of transportation, if the proposed activity will set new precedent or have a significant economic impact, or if an OA requests participation. PHMSA does not conduct initial safety profile reviews as part of processing classification approvals, which include fireworks, explosives, organic peroxides, and self-reactive materials. Additionally, cylinder approvals and certification agency approvals do not follow the same minimum safety profile review model.

(i) Automated Review. An applicant for a special permit or approval which requires a safety profile evaluation, but does not include coordination with an OA, is subject to an automated safety profile review. If the applicant passes the initial automated review, the applicant is determined to be fit. If the applicant fails the initial automated review, the applicant is subject to a safety profile evaluation. An applicant that fails a safety profile evaluation may be determined to be unfit. To begin this review, PHMSA or the applicant enters the applicant's information into the web-based Hazardous Materials Information System (HMIS) or Hazmat Intelligence Portal (HIP), or other future application processing technology that provide an integrated information source to identify hazardous material safety trends through the analysis of incident and accident information, and provide access to comprehensive information on hazardous materials incidents, special permits and approvals, enforcement actions, and other elements that support PHMSA's regulatory program. PHMSA then screens the applicant to determine if, within the four years prior to submitting its application, the applicant was involved in any incident attributable to the applicant or package where two or more triggers for a safety profile review or five or more triggers for on-site inspection enforcement case referral events occurred.

(1) The trigger events are listed in the following table:

<p style="text-align: center;">Trigger for Safety Profile Review</p>	<p style="text-align: center;">Trigger for On-Site Inspection*</p>
<ol style="list-style-type: none"> 1) Any incident that involved a death or injury; 2) Two or more incidents involving a § 172.504(e) (placarding) Table 1 hazardous material; 3) Three or more incidents involving a bulk packaging, or an applicant that is acting as an interstate carrier of hazardous materials under the terms of the special permit or an approval; or 4) Any incident that involved: incorrect package selection; leaking packages; not following closure instructions; failure to test packages, if applicable; and failure to secure packages, including incorrect blocking and/or bracing. 	<ol style="list-style-type: none"> 1) Evidence that an applicant is at risk of being unable to comply with the terms of an application, including those listed below. 2) An on-site inspection at the recommendation of the fitness coordinator if the following criteria applies -- Any incident listed under automated review in paragraph 3(b)(i) of this appendix is attributable to the applicant or package, other than driver error; 3) If, during an inspection, evidence is found in the four years prior to submitting its application that an applicant has not implemented sufficient corrective actions for prior violations, or is at risk of being unable to comply with the terms of an application for a special permit or approval, an existing special permit or approval, or the HMR, then PHMSA will determine that the applicant is unfit to conduct the activities requested in an application or authorized special permit or

	<p>approval.</p> <p>4) Incorrect or missing:</p> <p>(a) markings,</p> <p>(b) labels,</p> <p>(c) placards, or</p> <p>(d) shipping papers.</p>
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* The Fitness Coordinator assesses and applies these triggers.

(2) If an applicant is acting as an interstate carrier of hazardous materials under the terms of the special permit, they will be screened in an automated manner based upon criteria established by FMCSA, such as that contained in its Safety and Fitness Electronic Records (SAFER) system, which consists of interstate carrier data, several states' intrastate data, interstate vehicle registration data, and may include operational data such as inspections and crashes.

(ii) Safety profile evaluation. A fitness coordinator, as defined in § 107.1, conducts a safety profile evaluation of all applicants meeting any of the criteria listed earlier in this appendix under “automated review,” and all applicants whose safety profile evaluations are subject to coordination with an OA, as described in introductory paragraph 3(b) of this appendix. In a safety profile evaluation, PHMSA or the OA performs an in-depth evaluation of the applicant based upon items the automated review triggered concerning the applicant’s four-year performance and compliance history prior to the submission of the application. Information considered during this review may include the applicant’s history of prior violations, insufficient corrective actions, or evidence that the applicant is at risk of being unable to comply with the terms of an application for an existing special permit, approval, or the HMR. PHMSA performs the review or coordinates with the OAs, if necessary, if two or more modes of transportation are requested in the application, and coordinates this review with the OA(s) of the applicable

mode(s). The applicable OA performs the review if one mode of transportation is requested in the application. If necessary, the fitness coordinator will attempt to contact the applicant for clarifying information. If the information provided is sufficient, an on-site inspection may not be necessary. After conducting an evaluation, if the fitness coordinator determines that the applicant may be unfit to conduct the activities requested in the application, the coordinator will forward the request and supporting documentation to PHMSA's Field Operations Division, or a representative of the Department, such as an authorized Operating Administration representative, to perform an on-site inspection. After the safety profile evaluation is completed, if the applicant is not selected for an on-site inspection, the applicant is determined to be fit. On-site inspections are not required for fitness determinations from modal administrations according to their own procedures.

(iii) On-Site Inspection. (A) The factors in paragraph 3(b)(i) and 3(b)(ii) are used as evidence that an applicant is at risk of being unable to comply with the terms of an application, including those listed below. PHMSA's Field Operations Division or representative of the Department, such as an Operating Administration representative, will conduct an on-site inspection at the recommendation of the fitness coordinator if one of the following criteria applies:

- (1) Any incident listed under automated review in paragraph 3(b)(i) of this appendix is attributable to the applicant or package, other than driver error;
- (2) Insufficient Corrective Actions, as defined in § 107.1, in any enforcement case for a period of four years prior to submitting the application, except when re-inspected with no violations noted; or

(3) Items noted by an IIA on a cylinder requalifier inspection report, except when re-inspected with no violations noted.

(B) If, during an inspection, the PHMSA investigator or a representative of the Department finds evidence in the four years prior to submitting its application that an applicant has not implemented sufficient corrective actions for prior violations, or is at risk of being unable to comply with the terms of an application for a special permit or approval, an existing special permit or approval, or the HMR, then PHMSA will determine that the applicant is unfit to conduct the activities requested in an application or authorized special permit or approval.

4. Disposition. (a) Special Permit. If an application for a special permit is issued, PHMSA provides the applicant, in writing, with a special permit and an authorization letter if party status is authorized.

(b) Approval. If an application for approval is issued, PHMSA provides the applicant, in writing, with an approval, which may come in various forms, including:

(1) An “EX” approval number for classifying an explosive (including fireworks; see §§ 173.56, 173.124, 173.128, and 173.168(a));

(2) A “RIN” (requalification identification number) to uniquely identify a cylinder requalification, repair, or rebuilding facility (see § 180.203);

(3) A “VIN” (visual identification number) to uniquely identify a facility that performs an internal or external visual inspection, or both, of a cylinder in conformance with 49 CFR part 180, subpart C, or applicable CGA Pamphlet or HMR provision;

(4) An “M” number for identifying packaging manufacturers (see § 178.3); or

(5) A “CA” (competent authority) for general approvals (see §§ 107.705, 173.185, and 173.230).

(c) Denial. An application for a special permit or approval may be denied in whole or in part. For example, if an application contains sufficient information to successfully complete its technical review but the Associate Administrator determines the applicant is unfit, the application will be denied. If an application for a special permit or an approval is denied, PHMSA provides the applicant with a brief statement, in writing, of the reasons for denial and the opportunity to request reconsideration (see §§ 107.113(g), 107.402, and 107.709(f)).

(d) Reconsideration and Appeal. (1) Special Permit. If an application for a special permit is denied, the applicant may request reconsideration as provided in § 107.123 and, if the reconsideration is denied, may appeal as provided in § 107.125. Applicants submitting special permit reconsiderations and appeals must do so in the same manner as new applications, provided the new submission is sufficiently complete to make a determination.

(2) Approval. If an application for an approval is denied, the applicant may request reconsideration as provided in § 107.715 and, if the reconsideration is denied, may appeal as provided in § 107.717. Applicants submitting approval reconsiderations and appeals must do so in the same manner as new applications, provided the new submission is sufficiently complete to make a determination.

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

10. The authority citation for part 171 is revised to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410, section 4 (28 U.S.C. 2461 note); Pub. L. 104–121, sections 212–213; Pub. L. 104–134, section 31001; 49 CFR 1.81 and 1.97.

11. In § 171.8, the definitions for “approval,” and “special permit” are revised to read as follows:

§ 171.8 Definitions and abbreviations.

* * * * *

Approval means a written authorization, including a competent authority approval, issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise prescribed in the HMR, to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter (49 CFR parts 171 through 180).

* * * * *

Special permit means a document issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise prescribed in the HMR, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapter A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 et seq. (e.g., Federal Motor Carrier Safety routing requirements).

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Issued in Washington, DC, on September 2, 2015, under the authority delegated in 49 CFR part 1.97.

Marie Therese Dominguez
Administrator
Pipeline and Hazardous Materials Safety Administration

[FR Doc. 2015-22617 Filed: 9/9/2015 08:45 am; Publication Date: 9/10/2015]